TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 553

FEDERAL RESERVE BANK OF RICHMOND, PLAINTIFF IN ERROR,

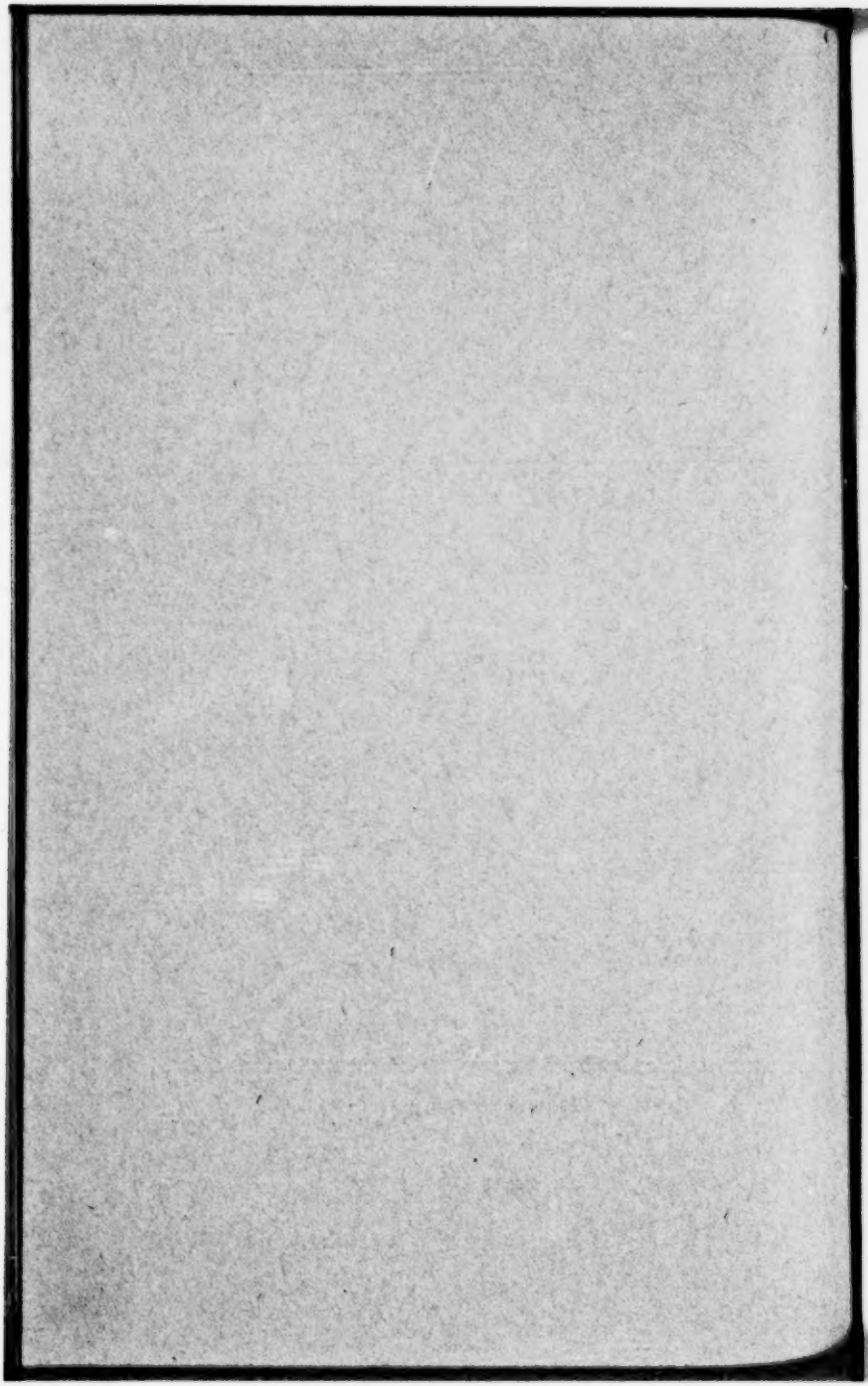
vs.

D. J. MALLOY AND J. H. MALLOY, TRADING AS MALLOY BROTHERS

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED SEPTEMBER 18, 1923

(29,863)



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UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Asheville, North Carolina, on the first Tuesday in July, being the third day of the same month, in the year of our Lord one thousand nine hundred and twenty-three.

Present: Hon. Charles A. Woods, Circuit Judge; Hon. Edmund Waddill, Jr., Circuit Judge; Hon. D. Lawrence Groner, District Judge.

Among other were the following proceedings, to-wit:

Federal Reserve Bank of Richmond, Plaintiff in Error

versus

D. J. Malloy & J. H. Malloy, Trading as Malloy Brothers, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

Be it remembered that heretofore, to-wit, on March 22, 1923, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

TRANSCRIPT OF RECORD

THE UNITED STATES OF AMERICA,
EASTERN DISTRICT OF NORTH CAROLINA, To-wit:

At a District Court of the United States for the Eastern District of North Carolina, begun and held at the Court House in the City of Raleigh, on the fourth Monday in November, being the 20th day of the same month, in the year of our Lord one thousand, nine hundred and twenty-two.

Present: The Honorable Henry G. Connor, District Judge for the Eastern District of North Carolina.

Among other were the following proceedings, to-wit:

D. J. Malloy & J. H. Malloy, Partners trading as Malloy Brothers,
vs.
Federal Reserve Bank of Richmond and Napier H. G. Balfour.
#923 Law.

COMPLAINT.

(2) Filed July 5, 1921, in Superior Court of Cumberland County.

NORTH CAROLINA,
Cumberland County. In Superior Court.

D. G. Malloy & J. H. Malloy, Partners trading as Malloy Brothers,
vs.
Federal Reserve Bank of Richmond and Napier H. G. Balfour.
Complaint.

The Plaintiffs complaining of the defendants, allege:

1. That the plaintiffs, D. G. Malloy and J. H. Malloy are partners trading under the firm name and style of Malloy Brothers, and were at the times hereinafter mentioned.

2. That, as they are informed and believe, the defendant, the Federal Reserve Bank of Richmond, is, and was at the times hereinafter mentioned, a corporation created, organized and existing by virtue of the "Federal Reserve Act" of December 23rd, 1913, and acts of Congress amendatory thereto, with its principal place of business in the city of Richmond, Va.

3. That the defendant, Napier H. G. Balfour, being indebted to the plaintiffs on the purchase price of land, did, on November 30th, 1920, mail his check to their order, at Quitman, Georgia, on the Bank of Lumber Bridge, Lumber Bridge, North Carolina, in the sum of Nine Thousand Dollars ($9,000.00), which was received by plaintiffs on December 2nd, and by them endorsed and deposited with the Perry Banking Company, at Perry, Florida, the next day.

4. That, as plaintiffs are informed and believe, the said Perry Banking Company duly forwarded said check to its correspondent in Jacksonville, Florida, the Atlantic National Bank, which in turn duly forwarded the same to its correspondent in Atlanta, Georgia, the Citizens & Southern Bank, which in turn fuly forwarded it to the defendant, the Federal Reserve Bank of Richmond.

(3) 5. That as plaintiffs are informed and believe, the defendant, Federal Reserve Bank of Richmond, negligently mailed said check direct to the said Bank of Lumber Bridge and negligently accepted in payment thereof the latter's draft on a bank in Greensboro, North Carolina, which check the drawee bank on December 14th, 1920, marked "Paid" and charged to the account of the drawer, and subsequently returned to the defendant, Napier H. G. Balfour.

6. That, as plaintiffs are informed and believe, the defendant, Napier H. G. Balfour, at the time said check

was charged against his account, to-wit: December 14th, 1920, had on deposit with said Bank of Lumber Bridge an amount sufficient to meet and pay said check of $9,000.00.

7. That the defendant, Federal Reserve Bank of Richmond, carelessly and negligently failed to notify plaintiffs that it had not received the money for said check until December 21st, 1920, after having already notified them that the said check had been lost in the mails, and that, as plaintiffs are informed and believe, had the defendant bank notified them of the non-payment of said check promptly, as it was its duty to do, they and the defendant Balfour could and would have collected the said check.

8. That on the 24th day of December, 1920, as plaintiffs are informed and believe, the said Bank of Lumber Bridge, N. C., was adjudged insolvent and a receiver appointed therefor, and he is now in charge of its assets and affairs.

9. That the defendant, Napier H. G. Balfour, denies that he is indebted to the plaintiffs, claiming his said debt has been paid by reason of the matters hereinbefore set forth.

10. That, as plaintiffs are advised, informed and believe, the defendant, Federal Reserve Bank of Richmond, acted as their agent, and that it was careless and negligent in sending said check direct to the drawee bank; in accepting its draft on the Greensboro Bank; in surrendering said check to the Bank of Lumber Bridge, N. C., without having collected the money therefor; in wrongfully notifying said plaintiffs that the said check had been lost in the mail; and in failing to notify (4) plaintiffs until December 21st, 1920, that it had not collected the money on said check; and that by reason of such carelessness and negligence of the defendant bank, the plaintiffs have been damaged, no part of the aforesaid $9,000.00 having been received by them.

Wherefore, Plaintiffs demand judgment against the defendant, Napier H. G. Balfour, for the sum of $9,000.00

and interest thereon from Nov. 30th, 1920, and the costs of this action, or in lieu thereof, for the said principal amount, and interest and costs against the defendant, the Federal Reserve Bank of Richmond, and for such other relief as they may be entitled to.

(s) SINCLAIR & DYE,
(s) BRANCH & SNOW,
Attorneys for Plaintiff.

STATE OF GEORGIA,
County of Brooks.

D. G. Malloy, one of the plaintiffs herein, being duly sworn, says that the foregoing complaint is true of his own knowledge except as to those matters and things therein alleged upon information and belief, and that, as to those, he believes it to be true.

D. G. MALLOY.

Sworn to and subscribed before me this 2nd day of July, 1921.

L. M. BRADFORD,
(Notarial Seal) Notary Public. (s)

My commission expires May, 1925.

ANSWER OF FEDERAL RESERVE BANK OF RICHMOND.

(5) Filed August 5, 1921.

The Federal Reserve Bank of Richmond answering the complaint of D. J. Malloy and J. H. Malloy, for answer, says:

I.

That this defendant does not waive its motion heretofore made to dismiss this action for lack of sufficient service of process on this defendant, but insists thereupon.

II.

Now specifically answering the complaint of the plaintiffs in this action this defendant says:

(1) This defendant admits the matters and things alleged in the first paragraph of the complaint.

(2) This defendant admits the matters and things alleged in the second paragraph of the said complaint.

(3) The defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph three of the complaint and the same are therefore denied.

(4) This defendant is not informed as to whether or not the Perry Banking Company forwarded the check mentioned in the complaint to the Atlantic National Bank in Jacksonville, Florida, and, therefore, calls for strict proof of such fact, and also for proof of the terms and conditions upon which the said Atlantic National Bank received said check for collection. This defendant is informed and believes that the Atlantic National Bank of Jacksonville, Florida, forwarded said check for collection to the Citizens & Southern Bank, Atlanta, Ga., but alleged that said Citizens & Southern Bank received the said check for collection under an express contract concerning its liability and the liability of the sub-agents to which it might send such checks; such contract being as follows:

"Drafts and checks on a bank in town having no other bank may, in the absence of special instructions from the Depositor or Correspondent, be sent to such bank for collection. If the proceeds in cash or drafts, or checks on other banks, or other cash item, do not reach this bank, the credit given for them will be cancelled. The Bank receives drafts, cash items and Checks on other Banks, as a forwarder for collections only without liability for sub-agent, upon the above conditions, to which the Depositor or Correspondent hereby agrees.

THE CITIZENS AND SOUTHER BANK,
Atlanta, Ga.

All Foreign Items Credited Subject to Ultimate Payment."

(6) This defendant admits that the check mentioned in the complainant's bill of complaint was sent to this defendant by the Citizens & Southern Bank, Atlanta, Ga., but defendant says that in so sending it the Citizens & Southern Bank acted for and on behalf of the Federal Reserve Bank of Atlanta, and that in receiving said check this defendant received it for the account and credit of the Federal Reserve Bank of Atlanta in accordance with the regulations of the Federal Reserve Board regulating the liability between Federal Reserve Banks and member banks, which regulations will be more fully set forth below.

(5) Defendant admits that it mailed the said check to the Bank of Lumber Bridge and admits that it accepted from the Bank of Lumber Bridge in settlement for this check and other checks sent to it by this defendant a certain draft of the Bank of Lumber Bridge dated December 14, 1920, drawn on the Atlantic Bank & Trust Co., Greensboro, N. C., for the sum of $9,204.90, but this defendant denies that in so sending said check directly to the Bank of Lumber Bridge or in so accepting such draft of the Bank of Lumber Bridge it was in any way negligent and says that it was authorized to do so by the regulations of the Federal Reserve Board above referred to, and the contracts existing between itself and the Federal Reserve Bank of Atlanta, and between the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank of Atlanta, as will be hereafter more fully set forth. This defendant has no knowledge or information sufficient to form a belief as to whether or not a check for $9,000.00 was marked "Paid" and charged to the account of the co-defendant, Napier H. G. Balfour, and the same is therefore denied.

(6) This defendant has no knowledge or information sufficient to form a belief as to whether or not the defendant, Napier H. G. Balfour, had on deposit with the said Bank of Lumber Bridge an amount sufficient to meet and pay said check for $9,000.00, and denies this allegation.

(7) This defendant denies that it carelessly and negligently failed to notify the plaintiffs that it had not received the money for the check mentioned in the said complaint, and alleges that as soon as this defendant discovered that the Bank of Lumber Bridge could not pay the said check and that the draft of the Bank of Lumber Bridge given in payment thereof was not good and could not be collected, this defendant notified the Citizens & Southern Bank of Atlanta, Ga., that the check was not paid, and this defendant says that it used due diligence to collect the said check and the draft of the Bank of Lumber Bridge, which it received in settlement, and denies that the plaintiffs or Balfour could or would have collected the said check.

(8) This defendant admits that the Bank of Lumber Bridge was adjudged insolvent and a receiver appointed therefor in the month of December, 1920, and admits that such receiver is now in charge of its assets.

(9) This defendant is not informed concerning the allegations of paragraph nine of the said complaint, and, therefore, calls for strict proof of the same.

(10) This defendant denies that it acted as the agent of the plaintiffs in this case, and says that it acted as the agent of the Federal Reserve Bank of Atlanta, which was acting as the agent of the Citizens & Southern Bank of Atlanta, Ga., and this defendant denies says that in all its actions and doings in handling the said check for $9,000.00, in surrendering the same to the Bank of Lumber Bridge, and in accepting the draft of the said Bank of Lumber Bridge is used due diligence and was guilty of no negligence, and that it notified the Citizens & South-
(7) ern Bank, Atlanta, Ga., as soon as possible after this defendant knew, or by the exercise of diligence could have known, that the Bank of Lumber Bridge could not pay the said check.

III.

(1) And now by way of further answer and affirmative defense the defendant says that the Federal Reserve Act, under which this defendant is organized and

under which it does business, authorized this defendant and other Federal Reserve Banks to receive for collection from member banks within its own district checks and drafts payable upon presentation, and that it is authorized to receive from other Federal Reserve Banks checks and drafts payable upon presentation within its district. The Citizens & Southern Bank is located within the City of Atlanta, Ga., and is not within the Federal Reserve district of this defendant, but is within the Federal Reserve district of the Federal Reserve Bank of Atlanta, and this defendant says, therefore, it is not authorized to open an account directly with the Citizens & Southern Bank of Atlanta, but that for the convenience of that bank and of itself and of the Federal Reserve Bank of Atlanta it has agreed that the Citizens & Southern Bank may mail to the Federal Reserve Bank of Richmond checks and drafts payable within the Federal Reserve district of the Federal Reserve Bank of Richmond, which includes the State of North Carolina, and that such checks and drafts, if and when collected, shall be credited to the Federal Reserve Bank of Atlanta for the account of the Citizens & Southern Bank, but that such checks and drafts are deemed to have been received from the Federal Reserve Bank of Atlanta just as though they had been sent by the Citizens & Southern Bank of Atlanta to the Federal Reserve Bank of Atlanta and by the Federal Reserve Bank of Atlanta sent to the Federal Reserve Bank of Richmond.

This defendant says that the Federal Reserve Board is, by the Federal Reserve Act, authorized to establish regulations concerning the clearing and collection of checks received by Federal Reserve Banks from their member banks and other Federal Reserve Banks, and that in the exercise of such power the Federal Reserve Board has made and promulgated a certain regulation known as Regulation J, Series of 1920, which reads in part as follows:

"In handling items for member and nonmember clearing bank, a Federal Reserve Bank will act as agent only. The Board will require that each member and nonmember clearing bank authorize its Federal Reserve Bank to send checks for collection to banks on which checks are drawn, and, except for negligence, such Fed-

eral Reserve Bank will assume no liability. Any further requirements that the Board may deem necessary will be set forth by the Federal Reserve Banks in their letters of instruction to their member and nonmember clearing banks. Each Federal Reserve Bank will also promulgate rules and regulations governing the details of its operations as a clearing house, such rules and regulations to be binding upon all member and nonmember banks which are clearing through the Federal Reserve Bank."

(2) The defendant is informed, believes and charges that the Citizens & Southern Bank of Atlanta, Ga., had agreed with the Federal Reserve Bank of Atlanta that all checks received by the Federal Reserve Bank of Atlanta from the Citizens & Southern Bank, whether actually sent to the Federal Reserve Bank of Atlanta or sent to this defendant or other Federal Reserve Banks for the credit of the Federal Reserve Bank of Atlanta, should be handled in accordance with the above mentioned section of the Regulations of the Federal Reserve Board, and had especially agreed that all such checks should be sent for collection to the banks upon which they were drawn, and that the Federal Reserve Bank of Atlanta and this defendant should assume no liability, except for negligence.

(8) (3) This defendant says that it in order to collect such checks as it might receive upon the Bank of Lumber Bridge that it would send to such bank all checks which this defendant received upon the Bank of Lumber Bridge, and that the Bank of Lumber Bridge would, upon the day of receipt, return such checks as it was unwilling to pay and would remit for such checks as it desired to pay by means of its good exchange draft drawn upon some bank with which the Bank of Lumber Bridge kept an account and in which it had funds upon deposit.

(4) This defendant says that the check for $9,000.00 was received by this defendant from the Citizens & Southern Bank, Atlanta, Ga., in a certain letter dated December 8th, and received by this defendant on December 10th, and that upon December 10th this defendant enclosed the said check for $9,000.00 so received, along

with other checks, and sent the same to the Bank of Lumber Bridge in a letter dated and mailed on December 10th; and this defendant says that on December 14th the Bank of Lumber Bridge sent to this defendant a draft for the sum of $9,204.90, drawn by the Bank of Lumber Bridge on the Atlantic Bank & Trust Co., in Greensboro, N. C., which draft was sent in settlement for checks contained in the letter of December 10, 1921, above referred to.

(5) This defendant says that the above mentioned draft of the Bank of Lumber Bridge for the sum of $9,204.90 was received by it on December 15, and upon that day sent to the Atlantic Bank & Trust Co., Greensboro, N. C., for payment, and that the bank upon December 17th, advised this defendant that said draft for $9,204.90 was not good, whereupon this defendant immediately called upon the Bank of Lumber Bridge to make the same good and that bank assured this defendant that it would do so; but, nevertheless, failed to do so, and this defendant says that as soon as it discovered that the Bank of Lumber Bridge could not make good the above mentioned draft for $9,204.90 it notified the Citizens & Southern Bank, Atlanta, Ga., that this defendant had not received payment for the check for $9,000.00 received from the Citizens & Southern Bank of Atlanta, and this defendant immediately sent a special representative to endeavor to collect this money from the Bank of Lumber Bridge, but failed to do so because the said Bank of Lumber Bridge did not have available funds sufficient to pay the said sum.

This defendant is now holding the above mentioned draft for $9,204.90 as the agent and trustee of the Citizens & Southern Bank of Atlanta, Ga., and other correspondents of this defendant whose checks were contained in its letter of December 10th to the Bank of Lumber Bridge, and this defendant denies that it is responsible to the Citizens & Southern Bank of Atlanta, Ga., or to the plaintiffs in this action, or to any other person for the amount of the said check for $9,000.00, or for any other amount, except to the extent that this defendant may receive dividends from the receiver of the Bank of Lumber Bridge upon the above mentioned draft for

$9,204.90, and this defendant says that it has as yet received no dividends upon the said draft.

Wherefore, this defendant prays that the plaintiffs take nothing by this action and that it go without day and recover herein its costs.

THE FEDERAL RESERVE BANK OF RICHMOND,
By J. C. LITTLE,
M. G. WALLACE, Attorneys for Defendant.

STATE OF VIRGINIA,
(9) City of Richmond, To-wit:

Chas. A. Peple, being duly sworn, deposes and says that he is an officer of the Federal Reserve Bank of Richmond, to-wit, Deputy Governor of the Federal Reserve Bank of Richmond, and that the matters and things in the foregoing answer are true of his own knowledge, except to those matters and things therein alleged upon information and belief, and that, as to those, he believes them to be true.

CHAS. A. PEPLE.

Sworn to and subscribed before me this 2nd day of August, 1921.

C. VERSAL BLACKBURN.

My commission expires 26th day of Feb., 1924.

ANSWER OF NAPIER H. G. BALFOUR.

(10) Filed Dec. 14, 1921.

The defendant, Napier H. G. Balfour, answering the complaint herein, alleges:

1. That the allegations in Article One are admitted.

2. That the allegations in Article Two are admitted.

3. That the allegations in Article Three are admitted.

4. That the allegations in Article Four are admitted.

5. That the allegations in Article Five are admitted.

6. That the allegations in Article Six are admitted.

7. That the allegations in Article Seven are addditted.

8. It is admitted that the Bank of Lumber Bridge, under an order of its board of directors, suspended business on the 24th day of December, 1920, and that thereafter it was adjudged insolvent and a receiver appointed.

9. That the allegations in Article Nine are admitted.

10. That the allegations in Article Ten are admitted.

And by way of further defense, this defendant alleges:

1. That when he drew the said check for $9,000 on the 30th of November, 1920, in favor of the plaintiffs, and mailed it to them and continuously thereafter until the 14th day of December, 1920, he had on deposit in the Bank of Lumber Bridge to his credit on open account a sufficient amount of money to pay the said sum, and on the 14th day of December, 1920, the said check was charged to his account by the Bank of Lumber Bridge, marked by it "paid", and thereafter returned to this defendant in the regular course of business; At that time (11) this defendant had not idea that the Bank of Lumber Bridge was in an unsound condition, or contemplating suspending business, and that the said bank continued in business for ten days thereafter, during which time this defendant received no notice, intimation or suggestion that the payment of the said check was in any manner irregular, or would or could in any manner be questioned; And if this defendant had been notified that there was any irregularity or any question about the payment of said check, he would have had ample time to, and would have protected himself against any loss on account thereof.

2. That at the time the said check was drawn, and at the time it was presented, this defendant had on deposit with the Bank of Lumber Bridge a sufficient amount to pay the same, and the same, when presented, was paid, charged to the account of this defendant, and surrendered in the regular course of business, and thereupon the indebtedness of this defendant to the plaintiffs to the extent of the said check became fully paid and satisfied, and if the plaintiffs, or those acting for them, having selected the Bank of Lumber Bridge as the agency through which the funds so paid by this defendant should be transmitted to them, saw fit to accept from said bank, in payment therefor, anything other than cash, or its equivalent, such transaction between the plaintiffs, or those acting for them, and the Bank of Lumber Bridge is one with which this defendant is not concerned, and he alleges that his indebtedness to the plaintiffs to the extent of the said check has been paid, and that they are entitled to recover nothing from him on account of the matters and things set forth in the complaint.

Wherefore, having fully answered, this defendant demands judgment that he go hence without day and recover his costs in this behalf expended.

J. BAYARD CLARK,
Attorney for Napier H. G. Balfour.

NORTH CAROLINA,
Robeson County.

Napier H. G. Balfour, one of the defendants, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to those matters and things therein alleged upon information and belief, and that, as (12) to those, he believes it to be true.

NAPIER H. G. BALFOUR.

Sworn to and subscribed before me this 2nd day of Dec., 1921.

A. F. TOLAR,
(Seal) Notary Public.

My commission expires 3-14-23.

STIPULATION OF COUNSEL WAVING TRIAL BY JURY.

(13) Filed March 10, 1922.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

D. G. Malloy & J. H. Malloy, Partners, trading as Malloy Brothers,

vs.

Federal Reserve Bank of Richmond and Napier H. G. Balfour.

It is hereby stipulated and agreed between the parties, by Counsel, that all issues of fact in the above entitled case may be tried by the Court without a jury, and finding of the Court upon the facts shall have the same effect as the verdict of a jury.

It is further stipulated and agreed that judgment may be entered either in term time or vacation, and that any party shall have thirty days after the entry of such judgment to prepare and present bills of exception.

Given under our hands this 10th day of March, 1922.

SINCLAIR & DYE,
Counsel for D. G. Malloy and J. H. Malloy, trading as Malloy Brothers.
J. BAYARD CLARK,
Counsel for Napier H. G. Balfour.
J. C. LITTLE,
M. G. WALLACE,
Counsel for Federal Reserve Bank of Richmond.

OPINION OF THE COURT.

(14) Filed July 8, 1922.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.
AT RALEIGH.

D. J. Malloy and J. H. Malloy, Trading as Malloy Brothers,
vs.
Federal Reserve Bank of Richmond and Napier H. G. Balfour.
No. 923.

Sinclair & Dye, of Fayetteville, N. C., for Plaintiff; and M. G. Wallace, of Richmond, Va., and Little & Barnes, of Raleigh, N. C., for Defendant, Federal Reserve Bank; McCormick & Clark, of Fayetteville, N. C., for defendant Balfour.

CONNOR, District Judge:

Action for recovery of amount of check alleged to have been lost by negligence of defendant, in course of collection.

The parties waived trial by jury and submitted the case to the Court to find the facts and render judgment thereon.

The evidence disclosed the following facts:

Defendant, Napier H. G. Balfour, on November 30, 1920, drew and sent to plaintiffs by mail at Quitman, Georgia, his check for Nine Thousand Dollars ($9,000.00) on the Lumber Bridge Bank, a duly chartered and organized corporation authorized to carry on the business of banking at Lumber Bridge, North Carolina, to be applied to the credit of his indebtedness to plaintiffs, evidenced by his note, secured by mortgage on real estate situated in North Carolina.

(15) Plaintiffs received the check on the morning of December 1st, 1920, credited the amount on Balfour's note, and sent the check properly endorsed, with a deposit slip, on same day to Perry Banking Company at Perry, Florida, at which place said Banking Company was engaged in the banking business.

The Perry Banking Company, on December 3rd, received the check for collection and credit and, on the next day, sent to plaintiff a credit card on which was printed, "Checks, drafts, etc., received for collection or deposit, are taken at the risk of the endorser until actual payment is received."

The Perry Banking Company, on the same day, endorsed and sent the check to the Atlantic National Bank of Jacksonville, Florida, and on December 6, 1920, said Bank endorsed and sent it to the branch of Citizens and Southern Bank at Atlanta, Georgia.

The said Bank, December 8th, 1920, endorsed the check with the double endorsement stamp of itself and the Federal Reserve Bank of Atlanta, and sent it to the

Federal Reserve Bank of Richmond for collection and credit to the Federal Reserve Bank of Atlanta, Georgia, the Citizens and Southern Bank of Atlanta being a member of the Reserve Bank of Atlanta, Georgia.

On December 10, 1920, the Federal Reserve Bank of Richmond, sent to the Bank of Lumber Bridge a letter containing the Balfour, and several other checks, drawn upon said bank, aggregating $9,356.44 for collection and remittance. This letter, by due course of mail between Richmond and Lumber Bridge, should have been received by the Bank of Lumber Bridge on Saturday, December 11th, 1920. On Tuesday, December 14th, the Cashier of the Lumber Bridge Bank, stamped the Balfour check "Paid" and charged it to the account of Balfour on which there was to his credit, subject to check, $9,204.90.

On the same day the Lumber Bridge Bank drew and mailed to the Federal Reserve Bank of Richmond, its check on the Atlantic Banking and Trust Company of Greensboro, North Carolina, for the sum of $9,204.90, the aggregate amount of the checks sent to said bank by the Federal Reserve Bank of Richmond, in its letter of December 16th, less the amount of checks on said Bank for which the drawers did not have balances sufficient to
(16) pay.

The Federal Reserve Bank of Richmond received said letter, containing the check December 15th, 1920, and on same day forwarded the check to the drawee, Atlantic Banking & Trust Company, of Greensboro, North Carolina, for payment. On December 17, 1920, the Atlantic Banking & Trust Company, wired the Federal Reserve Bank of Richmond that the Lumber Bridge Bank did not have sufficient funds to its credit to pay said check.

The defendant, Richmond Bank, on the same day, wired the Lumber Bridge Bank notice of the dishonor of its check, calling upon said Bank to make the check good, which wire the Lumber Bridge Bank answered promising to do so.

Upon its failure to make the check good, the defendant, Richmond Bank, sent a representative to Lumber Bridge who reached there on the morning of December 20th, 1920, being Monday, saw the Cashier of the Lumber Bridge Bank and demanded payment of the check

on the Greensboro Bank. The Cashier stated that the Bank did not have sufficient funds to pay the amount of its dishonored check on the Greensboro Bank. That the Directors of the Bank would meet that night and make an effort, by endorsing a note of the Bank to the Bank of Lumberton, North Carolina, upon which the Bank would be able to secure funds with which it could pay the amount of the dishonored check.

On Tuesday morning, December 21, 1920, the Cashier of the Lumber Bridge Bank informed the representative of defendant, Richmond Bank, that the Directors refused to endorse the note with which to secure the funds and that he could not pay, or take up, the check. Defendant, the Federal Reserve Bank of Richmond, on the same day, wired the Citizens and Southern Bank of Atlanta, that the Balfour-Malloy check was unpaid and on the same day sent a letter to said Bank, stating the facts in connection therewith, and that the amount of the check Nine Thousand Dollars ($9,000.00) would be charged to the account of said Bank if the check of the Lumber Bridge Bank was not ultimately paid. Malloy Brothers were promptly notified of the situation. Upon being notified by Malloy, Balfour was informed by the Cashier of the Lumber Bridge Bank that he could not make the check on Greensboro good. Upon appropriate proceedings under the North Carolina statutes, on December 24, 1920, the Lumber Bridge Bank was closed and its assets placed in the custody of a Receiver.

The defendant, Richmond Bank, charged the amount (17) of the check to the Federal Reserve Bank of Atlanta, which charged same to the Citizens and Southern Bank. The several Banks handling the check charged the amount to their several correspondents until it was charged back to Malloy Brothers by the Perry Banking Company. At the date of the institution of this action no dividends had been paid by the Receiver. The defendant, Federal Reserve Bank of Richmond, retained the check on Greensboro. Upon the trial it was stated that there was reasonable cause to believe that a dividend of 75% would be paid.

The Bank of Lumber Bridge was not a member of the Reserve Bank system, but had, prior to the date of this transaction, pursuant to the Regulations of the Federal Reserve Board (October, 1920, Regulation J) en-

tered into an arrangement with said bank for the collection of checks drawn upon it, at par. The Regulation (1) provides that, "Each Federal Reserve Bank will receive at par from its member banks and from non member clearing banks, in its district, checks drawn on all member and non member clearing banks, and on all other non member banks which agree to remit at par through the Federal Reserve Bank of this District. The same privilege is extended to (2) "Federal Reserve Banks to receive checks for collection from other Federal Reserve Banks and from all member and non member clearing banks regardless of their location.

. . . Checks drawn upon all member and non member clearing banks of its district and upon all other non member banks of its district whose checks are collected at par by the Federal Reserve Bank."

This action was brought in the Superior Court of Cumberland County, North Carolina, and upon petition of defendant Bank, removed into this Court. Plaintiffs, following the allegations covered by the foregoing facts, allege:

"That as plaintiffs are informed and believe, the defendant, Reserve Bank of Richmond, negligently mailed said check to the said Bank of Lumber Bridge, and negligently accepted in payment thereof the latter's draft on a Bank in Greensboro, North Carolina, which check the drawee bank on December 14, 1920, marked "Paid" and charged to the account of the drawer, and subsequently charged to the defendant, Napier H. G. Balfour."

"That Balfour had, at the time said check was charged against his account, to-wit: December 14, 1920, (18) on deposit with said Bank of Lumber Bridge an amount sufficient to pay said check of Nine Thousand Dollars ($9,000.00)."

"That the defendant, Federal Reserve Bank of Richmond, carelessly and negligently failed to notify plaintiffs that it had not received the money for said check until December 21, 1920. . . . and that, as plaintiffs are informed and believe, had the defendant bank notified them of the non-payment of said check promptly, as it was its duty to do, they and the defendant Balfour could and would have collected the said check."

"That, as plaintiffs are informed and believe the defendant, Federal Reserve Bank of Richmond, acted as their agent, and that it was careless and negligent in sending said check direct to the drawee bank; in accepting its draft on the Greensboro Bank, in surrendering said check to the Bank of Lumber Bridge, North Carolina, without having collected the money therefor; and in failing to notify plaintiffs until December 21st, 1920, that it had not collected said check."

In the light of these allegations several of the questions discussed by counsel become immaterial.

Defendant's counsel insist that plaintiffs cannot maintain the action because there is no contractual relation, or privity of contract, between plaintiffs and defendant, the Federal Reserve Bank of Richmond. This argument is based upon the theory that the check became the property of the Perry Banking Company upon its deposit, or that said Banking Company was not authorized, by the deposit of the check for collection, to appoint sub-agents for that purpose and that such other banks as it transmitted the check to became its agents and not the agents of the owners of the check. This view was, upon the facts in that case, adopted by the Supreme Court of Florida in *Brown* vs. *Peoples Bank*, 59 Florida 163; 52 So. 719; 52 L. R. A. N. S. 608. It is not necessary to do more than refer to the very interesting and learned discussion by Chief Justice Whitfield in that case because he states, at the conclusion of his opinion, that since the transaction, out of which that case arose, but before the decision, the legislature of Florida enacted a statute by which it is provided that:

"When a check is deposited in a bank for collection, it shall be considered due diligence on the part of (19) the bank in the collection of any check, etc., so deposited to forward, *en route*, the same, without delay, in the usual commercial way in use according to the regular course of business of banks and that the maker, etc., shall not be liable to the bank until actual payment is received."

For the purpose of this discussion the statute authorized the Perry Banking Company to employ subagents in making collection of the check, with the re-

sult that such sub-agents became the agents of the owner of the check. This statute crystallizes into positive law of the State, the rule which has been adopted in other jurisdictions as the proper method to be pursued and the extent of liability of collecting banks in such cases. This principle has been clearly stated by Judge Bynum, upon the authority of *Fabens* vs. *Mercantile Bank*, 23 Pick. 330; *Bank* vs. *Bank*, 75 N. C. 534, that:

"It is well settled that, when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine, it is well settled that if the acceptor of a bill or promissor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promissor." The rule is stated, with citation of authorities pro and con, in 2 Michie on Banks and Banking, Section 162 (2). This rule is usually referred to as the "Massachusetts Rule". In *Exchange National Bank* vs. *Third National Bank*, 112 U. S. 276, Justice Blatchford said:

"The authorities which support this rule rests on the proposition that, since what is to be done by a bank employed to collect a draft, payable at another place, cannot be done by any of its ordinary officers or servants, but must be entrusted to a sub-agent, the risk of the neglect of the sub-agent is upon the party employing the bank, on the view that he has implied authority to employ the sub-agent," citing *Dorchester Bank* vs. *New England Bank*, 1 Cush. (55 Mass.); *Milling Co.* vs. *Kuester*, 158 Ill. and many other decisions.

The result of this rule is that the sub-agent selected by the bank undertaking to collect the check, becomes the (20) agent of the owner of the check, thus establishing the contractual relation between the owner and such sub-agent and entitling the owner to sue either of the sub-agents for breach of duty. *Bank* vs. *Floyd*, 142 N. C.

163; *Winchester* vs. *Milling Co.*, 120 Tenn. 225; Ill. S. W. 248.

It is in recognition of this principle that plaintiffs sue the defendant, Federal Reserve Bank of Richmond, alleging the relation of principal and agent and breach of duty, in that the defendant, Federal Reserve Bank, negligently sent the Balfour check for collection to the drawee Bank of Lumber Bridge thus eliminating several questions discussed by counsel and narrowing the controversy to two questions:

1st. Was the defendant, Richmond Bank, negligent in sending the check to the drawee bank for collection?

2nd. Was the defendant guilty of negligence in accepting the check of the Bank of Lumber Bridge on the Greensboro Bank in payment of the Balfour check?

From this viewpoint no question respecting the manner or time in which the Perry Banking Company and its sub-agents, forwarded the check to the several banks and presented it to the drawee for payment. It will tend to simplification of the issues raised by the pleadings and the facts, in respect to which there is no controversy, to ascertain the extent of the liability of defendant bank, by regarding the relation between the parties to this action, as principal and agent, as alleged by plaintiffs.

Approached from this viewpoint, the first question for decision is, whether the defendant, Federal Reserve Bank, was negligent in the discharge of its duty by sending the check to the drawee Bank of Lumber Bridge. This question has been the subject of much discussion, resulting in differing conclusions. The general principle is stated in Michie on Banks and Banking, 2 Vol., Section 162 (1 b) with citation of authorities. The Supreme Court of North Carolina in *Bank* vs. *Floyd*, 142 N. C. 163, held that it was negligent in a bank, having a draft for collection to send it directly to the drawee; that the fact that the drawee was the only bank at the place of payment did not affect the principle, and that no custom (21) to the contrary would excuse the sending bank. The writer of this opinion, writing for the Court, in that

case, gave the subject careful investigation and cited the controlling authorities. The legislature of North Carolina, however, at its Session of 1919, Public Laws, Ch. 11, now Section 233, Consolidated Statutes, changed the law in that respect, by enacting a statute providing that "Any banking corporation or banking or trust company, doing a fiduciary business in this State receiving for collection or deposit any check . . . . drawn upon, or payable at, any other bank, located in another city or town, within or without this State, may forward such instrument for collection directly to the bank on which it is drawn or at which it is payable, and such method of forwarding direct to the payer shall be deemed due diligence; and the failure of such payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor, provided such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument. The provisions of this Act shall not apply where there is more than one bank in a town."

Plaintiffs insist that the defendant, Federal Reserve Bank of Richmond, is not within the terms of this statute, and can claim no immunity under its provisions, because it is not a banking corporation or banking or trust company "doing a fiduciary business in this State."

I incline to an agreement with plaintiffs' contention that the statute was intended, and its terms apply only to banks organized and doing business in the sense of having its principal office, in this State. It is a well settled principle adopted in the construction of statutes, that their provisions in respect to persons coming within their scope, are confined to citizens or corporations resident in the State, unless otherwise clearly expressed.

This question, however, becomes immaterial, in this case, because Regulation J (8) made by the Federal Reserve Board provides that:

"In handling items for member and non member clearing banks, a Federal Reserve Bank will act as agent only. The Board will require that each member and non member clearing bank authorize its Federal Reserve Bank to send checks for collection to banks on

(28) which checks are drawn and except for negligence, such Federal Reserve Bank will assume no liability."

This regulation, to the extent of its permissive provisions, must be taken to have been known to the Citizens and Southern Bank of Atlanta and the Federal Reserve Bank of Atlanta. The check was sent by them and received for collection by the defendant, Reserve Bank of Richmond, subject to the regulation which permitted the Richmond Bank to send the check to the drawee Bank of Lumber Bridge. This was done promptly—the check was mailed at Atlanta, December 8th, mailed by the defendant, Federal Reserve Bank, December 10th, 1920, and received by the Lumber Bridge Bank, December 11th, 1920, bing Saturday.

The Lumber Bridge Bank was the only Bank in the town at Lumber Bridge. There is no suggestion that, at that time, it was not in good standing and credit, or that defendant, Federal Reserve Bank of Richmond, had any cause to question its solvency or manner of conducting its business. It had made "a par collection" agreement with defendant Bank.

I am led to the conclusion that the defendant, Federal Reserve Bank of Richmond, was not negligent in sending the check to the Lumber Bridge Bank for collection, and that it acted in that respect, promptly and in accordance with the terms upon which it accepted and undertook to act as agent in collecting the check.

We are thus brought to the last and determinative averment of negligence; the acceptance by the defendant, Federal Reserve Bank of Richmond, of the check of the Lumber Bridge Bank on the Greensboro Bank. Preliminary to the decision of this question, it becomes material to ascertain what effect the conduct of the Lumber Bridge Bank had upon the status of the Balfour check and his libality thereon as drawer.

In *Bank* vs. *Floyd*, *supra*, it was conceded that, by charging the check to the account of the drawer, its depositor, who had to his credit a balance sufficient to pay it and cancelling it, by the Dunn Bank, occupying in that case, *pro hac vice* the position of the Lumber Bridge Bank, the check was paid and the drawer released.

In *Bank* vs. *South Weymouth Bank*, 184 Mass. 49, the note of a customer of the defendant bank, payable at that bank, and due, was sent by the holder, endorsed "for collection and remittance" to the defendant bank. (23) The makers of the note had to their credit and subject to check in the defendant bank, an amount sufficient to pay the note. Describing the conduct of the cashier of the defendant bank, Hammond, J., says:

"He intends as agent of the makers to pay this note to his own bank, the indorsee and holder, and as such entitled to receive payment and discharge the note. He intends as cashier of his own bank to cancel and discharge the note when paid, and then as agent of the makers to hold the paid note for them. After the note has been paid he intends to send the proceeds to the plaintiff. With these intentions he begins. The note is before him. He first draws on a bank in Boston his check as Cashier of the defendant, payable to the order of the plaintiff, for the amount of the proceeds of the note. It is to be observed that this is not the check of the makers, nor is it made by the Cashier as their agent, but in his capacity as agent of the defendant, and in the performance, not of a duty owed by the makers, but of a duty owed by the defendant to the plaintiff. It is not the check by which the note was paid, because none was needed, but was the check by which the proceeds were to be transmitted by the defendant to the plaintiff. He then makes a memorandum of this check upon a block, stamps upon the face of the note, "Paid Oct., 1901", and perforates it in three places, and puts the note, thus stamped and mutilated, in the file with his checks so that a proper record of the transaction may be entered at the end of the day upon the permanent books. The Cashier, at this time, was called to the 'phone and notified that the makers of the note have made an assignment for the benefit of creditors and is requested by the assignee to hold the account. He withheld the check which he had drawn and undertook to retrace his steps."

In an action by the Bank, owning and sending the note to the defendant Bank, for the proceeds of the note, "in assumpsit for money had and received", the Court held that "prior to the call to the telephone, the note had been paid by the makers to the deefndant and that

the only remaining duty resting upon the defendant was to remit the proceeds to the plaintiff . . . . The note was itself equivalent to a check . . . . When the Bank, through its cashier, wrote upon the face of the note, in its own name, as the indorsee and holder, that it was paid, and perforated it and put it in the files as a thing paid, nothing more was to be done as to the payment. (24) By those acts there had been set apart and appropriated, to the payment of the note, so much of the deposit then standing to the credit of the makers as was sufficient for that purpose, just as though the makers had presented to the bank their check in payment of a note due it from them." With appropriate changes and arrangement of the parties, the case is, in all essential respects, on "all fours" with the instant case and the conclusion irresistable the same to which the Massachusetts Court came.

The same conclusion was reached by the Supreme Court of Tennessee in *Milling Company* vs. *Black*, 120 Tenn. 225, in which it was held that: "When a check given by a debtor on a certain bank in payment of his debt, was by another bank acting as collector for the creditor and payee, forwarded for collection or payment, to the drawee bank, in which there was more than enough money on deposit to the credit of the drawer at the time the check arrived there to pay the same, whereupon the drawee bank drew its draft upon another bank for the amount of the check and forwarded the same to the collecting bank and charged, cancelled and surrendered the check to the drawer, he was thereby discharged from liabitlity on the debt." In that case it was held that the owner of the original check, by receiving the worthless check, ratified its acceptance by the collecting bank. *Corporation Commission* vs. *Bank*, 137 N. C. 697.

It is well settled by these, and other, authorities, as well as upon principle, that when the Cashier of the Lumber Bridge Bank stamped the check "Paid", charged it to his account and delivered it to Balfour, who had to his credit, subject to his check, an amount more than sufficient to pay his check, that the check was paid and his liability as maker or drawer discharged.

The Lumber Bridge Bank on December 14th, 1920, had credit balances as follows: Atlantic Banking and Trust Company, Greensboro, $6,225.01; American Na-

tional Bank, $8,157.00; Merchants National Bank $3,000.00. The National Bank $2,549.96, Cash $4,574.69, Merchants National Bank, Raleigh, $379.75, aggregating $16,810.98.

The dealings between the Lumber Bridge Bank and the Atlantic Banking and Trust Company between December 14th and December 18th, did not materially change the state of its accounts, nor does it appear that the available assets of the Lumber Bridge Bank were (25) reduced prior to December 24th, 1920.

The question is presented what, upon this state of the case, was the measure or standard of duty owed by the defendant, Federal Reserve Bank of Richmond, to the plaintiffs, owners of the check, in respect to the receipt from the Lumber Bridge Bank of its check on the Greensboro Bank.

The authorities appear to be practically uniform in holding that, in the absence of any instruction or permission from the owner of the check, or any custom brought to the notice of such owner to the contrary the bank had no authority to accept or receive in payment of the check entrusted to it for collection anything other than money.

Among many other decided cases the following are cited as sustaining this proposition:

In *Ward* vs. *Smith*, 74 U. S. 447, Justice Field says:

"When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country or in bills which pass as money at their par value, by the common consent of the community." *Midland National Bank* vs. *Brightwell*, 148 Mo. 358; 71 Am. St. Rep. 608. In *Fifth National Bank* vs. *Ashworth*, 123 Penn. 212; 2 L. R. A. 402, Paxson, J., says:

"It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection, it must return him the check or the money. It is

also equally clear that if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts the cashier's check or other obligation, in lieu thereof, its liability to its deposition is fixed—as much so as if it had received the cash. It has no right, *unless it is specially authorized to do so*, to accept anything in lieu of money."

In that case, W. gave to A. his check on the Penn. Bank. On the same day A. endorsed the check to the Fifth National Bank, with which he was a depositor, which sent the check to the Penn. Bank and received in return therefor a cashier's check, delivering to A. his check. The cashier's check was protested for non-payment and the Penn. Bank went into liquidation. The Judge said:

(26) "The plaintiff (Ashworth) has neither his check nor his money. Watson's account with the Penn Bank was good when the account was charged up to him. I am unable to see, therefore, that the plaintiff has any remedy against either Watson or the Penn Bank."

In *National Bank* vs. *Am. Exch. Bank*, 155 Mo. 320; 74 Am. St. Rep. 527, the Court quotes with approval 2 Daniel on Negotiable Instruments (4th Ed.), Section 1625.

In the United States it is quite certain that a banker, or other agent, holding a bill or note for collection, would act at his peril in delivering up a receipt or a check for the amount; and that if the debtor did not pay the amount in money, and the drawer, or endorser, were not duly notified, they would be discharged and the loss would fall on the collecting agent . . . This seems to us the correct doctrine, for the agent exceeds authority in taking the check and, therefore, acts at his peril. And while it may be, and as a general rule undoubtedly is, the practice of creditors, in mercantile communities, to take checks in the collection of debts, and frequently to surrender other instruments on receiving them, such a practice on the part of a principal, falls far short of a usage which would permit the agent to do likewise." *Bank* vs. *Cummings*, 89 Tenn. 609; 24 Am. St. Rep. 618. "There is no evidence of any custom existing either in

Virginia or North Carolina, by which collecting banks are authorized to accept from their agents or subagents, or from the drawee-banks in settlement of collections sent them, anything other than money in settlement of such collections. Plaintiff, J. H. Malloy, testified that he was engaged in the lumber business and knew "very little about the workings of a bank—did not instruct the Perry Banking Co.—just sent the check down there for credit during the course of business."

I am of the opinion that the defendant, Federal Reserve Bank of Richmond, was not authorized to accept in payment of the proceeds of the check from the Lumber Bridge Bank, its check or draft on the Greensboro Bank and that, in doing it, was negligent, or probably to state the situation more clearly, it exceeded its authority and is liable to plaintiffs for the amount of the Balfour check, unless it may reduce the amount by showing that on the date of its acceptance, December 15, 1920, it was (27) impossible for the Lumber Bridge Bank to pay the amount in money or its equivalent.

The Lumber Bridge Bank had, on December 14th, $16,810.00 and, so far as appears, on December 24th, 1920, when it went into the hands of a Receiver, cash $4,574.00, and which, with balances in other banks aggregated about $11,000.00. It held also bills and notes to an amount not stated in the evidence.

It was not until the last named day that a Receiver was appointed. During this time, the plaintiffs were without any remedy against Balfour, whose check was paid on December 14th, or the Lumber Bridge Bank, whose check was held, and is now held, for the proceeds of the Balfour check by defendant Bank.

I am of the opinion that, upon the undisputed facts, the defendant, Reserve Bank of Richmond, is liable to the plaintiffs for the amount of the Balfour check.

Judgment will be signed that defendant Balfour is not liable as maker or drawer of the check, and that plaintiffs recover of defendant, Federal Reserve Bank of Richmond, Nine Thousand Dollars, with interest from December 14, 1920, and the cost to be taxed by the Clerk.

H. G. CONNOR,
United States District Judge.

July 8th, 1922.

JUDGMENT.

(28) Filed March 9, 1923.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

D. J. Malloy and J. H. Malloy, Trading as Malloy Brothers,
vs.
Federal Reserve Bank of Richmond and Napier H. G. Balfour.

No. 923.
Judgment.

This cause coming on to be heard, and being tried before His Honor, H. G. Connor, Judge, the parties having waived trial by jury and submitted the case to the Court to find the facts and render judgment thereon, and after hearing the evidence and arguments, the Court found the facts as set forth in its opinion, dated July 8th, 1922.

It is Now, on motion of J. Bayard Clark, Esquire, Attorney for the defendant, Balfour, Considered, Adjudged and Ordered that the defendant, Napier H. G. Balfour is not liable as maker or drawer of the $9,000.00 check mentioned in the pleadings, and that he go hence without day.

Upon motion of Messrs. Sinclair & Dye and Branch & Snow, Attorneys for plaintiffs, It is Considered, Adjudged and Ordered that the Plaintiffs, D. J. Malloy and J. H. Malloy, trading as Malloy Brothers, do have and recover of the defendant, Federal Reserve Bank of Richmond, the sum of Nine Thousand Dollars ($9,000), with interest thereon from December 14, 1920, until paid, and the costs of this action to be taxed by the Clerk.

Done at Raleigh, North Carolina, this 1st day of December, 1922.

H. G. CONNOR,
United States District Judge.

BILL OF EXCEPTIONS NO. 1.

(29) Filed March 9, 1923.

Be it remembered that upon the trial of this case plaintiffs, to maintain the issue on their part, introduced the following evidence:

Plaintiffs offered in evidence the fourth paragraph of the further defense contained in the Answer of the Federal Reserve Bank of Richmond, which is as follows:

"This defendant says that the check for $9,000.00 was received by this defendant from the Citizens & Southern Bank, Atlanta, Ga., in a certain letter dated December 8th and received by this defendant on December 10th, and that upon December 10th this defendant enclosed the said check for $9,000.00 so received, along with other checks, and sent the same to the Bank of Lumber Bridge in a letter dated and mailed on December 10th; and this defendant says that on December 14th the Bank of Lumber Bridge sent to this defendant a draft for the sum of $9,204.90, drawn by the Bank of Lumber Bridge on the Atlantic Bank & Trust Co., in Greensboro, N. C., which draft was sent in settlement for checks contained in the letter of December 10, 1920, above referred to."

Plaintiffs also offered in evidence that part of the fifth paragraph of the further defense contained in the Answer of the Federal Reserve Bank of Richmond, which is as follows:

"This defendant says that the above mentioned draft of the Bank of Lumber Bridge for the sum of $9,204.90 was received by it on December 15, and upon that day sent to the Atlantic Bank & Trust Co., Greensboro, N. C., for payment, and that the bank upon December 17th advised this defendant that said draft for $9,204.90 was not good."

J. H. MALLOY.

Plaintiffs produced J. H. MALLOY, one of the plaintiffs, who, being duly sworn, testified as follows:

"I live in Georgia, but I was raised in North Carolina and moved from Robeson County, North Carolina, to Georgia about twenty-five years ago. I and my brother are operating a turpentine and real estate business in Georgia, near Perry, Florida."

Plaintiffs offered in evidence a check, which is as follows and endorsed as follows:

(30) 66-639

THE BANK OF LUMBER BRIDGE

Lumber Bridge, N. C., Nov. 30th, 1920 No. 7

Pay to the order of Malloy Brothers $9,000.00
Nine thousand & no/100.....DOLLARS

(N. P.)
63-131

For. . . . .

NAPIER H. G. BALFOUR

Credit our a/c Dec. 6—1920

Malloy Bros. THE ATLANTA NATIONAL BANK
Of Jacksonville, Fla.
63-2

Pay Federal Reserve Bank of Atlanta or order, prior endorsements guaranteed.

THE CITIZENS & SOUTHERN BANK,
Atlanta, Ga.

64-5 Dec. 8, 1920 64-5

Pay to the Order of Any Federal Reserve Bank or Member Bk.

FEDERAL RESERVE BANK OF ATLANTA.

Pay to the order of Any Bank, Banker or Trust Co. All Prior Endorsements Guaranteed. Dec. 3, 1920.

THE PERRY BANKING CO.

63-131 Perry, Fla. 63-131

On being shown the above mentioned check the witness testified:

DIRECT EXAMINATION.

"This is a check for $9,000.00 sent us by Mr. Balfour. It it dated November 30th. We received it on the morning of December 2nd, and mailed it on the only train with a deposit slip to the Perry Banking Company on that afternoon. On December 3rd we received a credit card for the check. We have not received the money for the check, because it was afterwards charged back to us by the bank on the 21st or 22nd of December. It was about that date that we first learned that the bank had not collected the money for the check. Mr. Scales wired us that it had not been paid and charged it back, but the check was not returned to me. I got it from Mr. Balfour, who just now handed it to me for the purpose of using it in evidence."

On Cross Examination, the witness testified:

"The check contains on its face a stamp reading "No-protest 63-131". I do not remember whether I waived protest on the check, but I did not put the stamp on it. I do not know whether the number is what is called the transit number of the Perry Banking Company or not. I know very little about the workings of a bank. I did not know that every bank was known by a certain number. I understand from Mr. Scales that the (31) Perry Banking Company sent this check to the Atlantic National Bank of Jacksonville, and that from

there it was sent to Atlanta, but I do not know of my own knowledge what happened to the check after it was deposited by us with the Perry Banking Company. I know that the words "No-protest" mean that the check should not be protested, but I did not give the Perry Banking Company any instructions about not protesting the check, but just sent them the check for credit. I have the credit slip to which I referred with me."

The witness here produces and reads the credit slip, the material portion of which reads as follows: "Checks, drafts, etc., received for collection or deposit are taken at the risk of the endorser until actual final payment is received."

"I think the name of Malloy Brothers on the check was written by our stenographer, who was acting as our agent."

"The check was given us by Mr. Balfour in part payment of a farm that he bought from us. The farm was in North Carolina, and we sold it to Mr. Balfour, taking back a deed of trust securing a note for the entire purchase price. We received no cash payment. The note was for $15,000.00, and this check for $9,000.00 was sent us as a credit on the note. Upon receipt of the check we endorsed a credit of that amount upon the note, but we still have the note in our possession and have not executed any release of the note. We have received no other payment on the note."

DIRECT EXAMINATION.

Plaintiffs introduce as a witness the defendant, NAPIER H. G. BALFOUR, who also testified as a witness in his own behalf:

"I live at Lumber Bridge, North Carolina, and have been living there for ten years. I was in the service during the World War, and before moving to Lumber Bridge I lived in Scotland. I was born in New Zealand, and I am a naturalized American citizen. This is the check which I sent Malloy Brothers. At the time I sent this check I had to my credit in the Bank of Lumber Bridge

the sum of $9,200.00. I had borrowed the money in England. I had possession of the check ever since it was cancelled by the Bank of Lumber Bridge. It was returned to me with a statement of my account after the bank closed."

The check is here offered in evidence, and it is admitted by the plaintiff and the defendant, Federal Re-
(32) serve Bank of Richmond, that the paid stamp was placed on the check on December 14th and it was on that day charged to Mr. Balfour's account.

"I had seen the check in the Bank of Lumber Bridge before it was returned to me, and it was marked paid at that time. The Bank of Lumber Bridge was closed about December 24th. It was doing business between December 14th and December 24th, and I was there during those dates."

CROSS EXAMINATION.

"I had a letter from Malloy Brothers about the 16th or 18 of December saying that the check had not been paid. I then went into the bank and inquired and they informed me that the check had been paid by a draft on Greensboro, and it was only due to the distance and the number of hands that it had to pass through that Malloy Brothers had not received the money. The officers of the Bank of Lumber Bridge did not tell me whether or not the draft on Greensboro had been paid, and I did not make any inquiry. I do not know whether the Bank of Lumber Bridge had as much as $9,000.00 in cash on hand when I called there. In their letter to me about the check Malloy Brothers merely said that they had not got the money on the check, and then I went to the bank. I did not see the check on that trip to the bank. On December 23rd I received a wire from Malloy Brothers saying that the check was not paid, and I went to the bank again and was shown the check stamped paid. Mr. Covington, the Cashier, said that remittance had been made for the check by means of a draft on Greensboro, but I was not satisfied. He asked me to remain easy that night, and said he would give me further information."

RE-DIRECT EXAMINATION.

"I did not remain very easy that night, and the next day Mr. Covington left town and went to Lumberton to try to arrange the matter, and then he 'phoned me to come down to Lumberton, and I went. There I learned that the officers of the bank did not know whether or not they could make arrangements to pay the check. They did not tell me whether or not they had sufficient money to pay the Greensboro draft, and I did not know whether or not they had sufficient money. I do not know of any way by means of which a person at Lumber Bridge could have gotten $9,000.00 from Mr. Covington."

Plaintiff here offered in evidence a page of the general ledger of the Bank of Lumber Bridge showing the daily balance which that bank carried with different correspondent banks as of December 14, 1920, and the (33a) amount of cash on hand. These amounts are as follows:

	Credit balance.
Bal. Atlantic Bank & Trust Co., Greensboro,	$6,225.01
American National Bank,	81.57
Merchants National Bank,	3,000.00
The National Bank,	2,549.96
Cash,	4,574.69
Merchants National Bank, Raleigh,	379.75
	$16,810.98

Plaintiff then rested.

EVIDENCE OF DEFENDANT, FEDERAL RESERVE BANK

The defendant offered in evidence Regulation J of the Federal Reserve Board, which regulation is as follows:

STIPULATION "J."

Regulation J
Series of 1920.
(33b) (Superseding Regulation J of 1917.)

CHECK CLEARING AND COLLECTION.

Section 16 of the Federal Reserve Act authorizes the Federal Reserve Board to require each Federal Reserve Bank to exercise the function of a clearing house for its member banks, and section 13 of the Federal Reserve Act, as amended by the act approved June 21, 1917, authorizes each Federal Reserve Bank to receive from any nonmember bank or trust company, solely for the purposes of exchange or of collection, deposits of current funds in lawful money, national-bank notes, Federal Reserve notes, checks, and drafts payable upon presentation, or maturing notes and bills, provided such nonmember bank or trust company maintains with its Federal Reserve Bank a balance sufficient to offset the items in transit held for its account by the Federal Reserve Bank.

In pursuance of the authority vested in it under these provisions of law, the Federal Reserve Board, desiring to afford both to the public and to the various banks of the country a direct, expeditious, and economical system of check collection and settlement of balances, has arranged to have each Federal Reserve Bank exercise the functions of a clearing house for such of its member banks as desire to avail themselves of its privileges and for such nonmember State banks and trust companies as may maintain with the Federal Reserve Bank balances sufficient to qualify them under the provisions of section 13 to send items to Federal Reserve Banks for purposes of exchange or of collection. Such nonmember State banks and trust companies will hereinafter be referred to in this regulation as nonmember clearing banks.

Each Federal Reserve Bank shall exercise the functions of a clearing house under the following general terms and conditions:

(1) Each Federal Reserve Bank will receive at par from its member banks and from nonmember clearing banks in its district check [1] drawn on all member and nonmember clearing banks and on all other nonmember banks which agree to remit at par through the Federal Reserve Bank of their district.

(2) Each Federal Reserve Bank will receive at par from other Federal Reserve Banks, and from all member and nonmember clearing banks, regardless of their location, for the credit of their accounts with their respective Federal Reserve Banks, checks drawn upon all member and nonmember clearing banks of its district and upon all other nonmember banks of its district whose checks are collected at par by the Federal Reserve Bank.

(3) Immediate credit entry upon receipt subject to final payment will be made for all such items upon the books of the Federal Reserve Bank at full face value, but the proceeds will not be counted as part of the minimum reserve nor become available to meet checks drawn until such time as may be specified in the appropriate time schedule referred to in subdivision 7.

(4) Checks received by a Federal Reserve Bank on its member or nonmember clearing banks will be forwarded direct to such banks and will not be charged to their accounts until sufficient time has elapsed within which to receive advice of payment, as shown by the appropriate time schedule referred to in subdivision 7.

(33c) (5) Under this plan each Federal Reserve Bank will receive at par from its member and nonmember clearing banks checks on all member and nonmember clearing banks and on all other nonmember banks whose checks can be collected at par by any Federal Reserve Bank. Member and nonmember clearing banks will be

[1] A check is generally defined as a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand.

required by the Federal Reserve Board to provide funds to cover at par all checks received from or for the account of their Federal Reserve Banks: *Provided, however*, That a member or nonmember clearing bank may ship currency or specie from its own vaults at the expense of its Federal Reserve Bank to cover any deficiency which may arise because of and only in the case of inability to provide items to offset checks received from or for the account of its Federal Reserve Bank.[2]

(6) Section 19 of the Federal Reserve Act provides that—

The required balance carried by a member bank with a Federal Reserve Bank may, under the regulations and subject to such penalties as may be prescribed by the Federal Reserve Board, be checked against and withdrawn by such member bank for the purpose of meeting existing liabilities: *Provided, however*, That no blank shall at any time make new loans or shall pay any dividends unless and until the total balance required by law is fully restored.

Items can not be counted as part of the minimum reserve balance to be carried by a member bank with its Federal Reserve Bank until such time as may be specified in the appropriate time schedule referred to in subdivision 7. Therefore, should a member bank draw against items before such time, the draft would be charged against its reserve balance if such balance were sufficient in amount to pay it; but any resulting impairment of reserve balances would be subject to all the penalties provided by the Act.

Inasmuch as it is essential that the law in respect to the maintenance by member banks of the required minimum reserve balance shall be strictly complied with,

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[2] In accordance with instructions issued by the Federal Reserve Board on April 24, 1917, the various Federal Reserve Banks have issued circulars setting forth the conditions under which their respective member banks may draw drafts on their Reserve Bank accounts payable with or through any other Federal Reserve Bank.

the Federal Reserve Board, under authority vested in it by section 19 of the Act, has prescribed as the basic penalty for any deficiency in reserves a sum equivalent to an interest charge on the amount of the deficiency of 2 per cent per annum above the ninety-day discount rate of the Federal Reserve Bank of the district in which the member bank is located, and has announced that it will prescribe for any Federal Reserve district, upon the application of the Federal Reserve Bank of that district, as an additional progressive penalty for any subsequent deficiency by the same member bank during the same calendar year a sum equivalent to an interest charge on the amount of the subsequent deficiency at a rate increasing one-half of 1 per cent for each such subsequent deficiency.

(7) Each Federal Reserve Bank will determine by analysis the amounts of uncollected funds appearing on its books to the credit of each member bank. Such analysis will show the true status of the reserve held by the Federal Reserve Bank for each member bank and will enable it to apply the penalty for impairment of reserve. Each Federal Reserve Bank will publish time schedules showing the time at which any item to it will be counted as reserve and become available to meet any checks drawn.

(8) In handling items for member and nonmember clearing banks, a Federal Reserve Bank will act as agent only. The Board will require that each member and nonmember clearing bank authorize its Federal Reserve Bank to send checks for collections to banks on which checks are drawn, and except for negligence, such Federal Reserve Banks will assume no liability. Any further requirements that the Board may deem necessary will be set forth by the Federal Reserve Banks in their letters of instruction to their member and nonmember clearing banks. Each Federal Reserve Bank will also promulgate rules and regulations governing the details of its operations as a clearing house, such rules and regulations to be binding upon all member and nonmember banks which are clearing through the Federal Reserve Bank.

(34) The defendant Federal Reserve Bank also offered in evidence Regulation H of the Federal Reserve Board, governing the membership of State banks and trust companies in the Federal Reserve System. So much of said regulation as is relevant to this case is as follows:

"V. POWERS AND RESTRICTIONS.

Every State bank or trust company while a member of the Federal Reserve System—

1. Shall retain its full charter and statutory rights as a State bank or trust company, subject to the provisions of the Federal Reserve Act and to the regulations of the Federal Reserve Board, including any conditions embodied in the certificate of approval.

2. Shall maintain such improvements and changes in its banking practice as may have been specifically required of it by the Federal Reserve Board as a condition of its admission and shall not lower the standard of banking then required of it; and

3. Shall enjoy all the privileges and observe all those requirements of the Federal Reserve Act and of the regulations of the Federal Reserve Board made in conformity therewith which are applicable to State banks and trust companies which have become member banks."

The defendant Federal Reserve Bank also offered and read in evidence Sections 35 and 36 of Article 19 of the Georgia Laws for 1919, as follows:

Sec. 35. Due Diligence on Part of Bank in Collecting.—When a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of such check, draft, note or other negotiable instrument so deposited, to forward and route the same without delay in the usual commercial way, according to the regular course of business of banks, and the maker, indorser, guarantor, or surety of any check, draft, note or other negotiable instrument so deposited shall be liable to the bank until actual final

payment is received; and when a bank receives for collection any check, draft, note or other negotiable instrument and forwards same for collection as herein provided, it shall be liable only after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid.

Sec. 36. Forwarding Check Direct to Payer.—Any bank, or banker, doing business in this State, receiving for collection or deposit, any check, note or other negotiable instrument drawn upon or payable at any other bank, located in another city or town, whether within or without this State, may forward such instrument for collection directly to the bank on which it is drawn or at which it is made payable, and such method of forwarding direct to the payor shall be deemed due diligence, and the failure of such payor bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor; provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument."

The Defendant Federal Reserve Bank of Richmond read in evidence, over the objection of the plaintiff, the depositions of J. E. Wallace and M. W. Bell, taken after due notice before Harvey L. Parry, a notary public, (on Feb. 27, 1922), at 423 Healey Building, in the City of Atlanta, Ga. The testimony of the said depositions being as follows:

(35) **TESTIMONY OF J. A. WALLACE.**

DIRECT EXAMINATION.

"My name is J. E. Wallace. I am Assistant Cashier of the Citizens & Southern Bank of Atlanta, and have been such since January, 1920. I have general charge of the Transit and Accounting Departments, through which department checks sent us for credit pass. I know that the check drawn for $9,000.00 by Napier H. G. Balfour on the Bank of Lumber Bridge w[illegible] received by the Citizens & Southern Bank of Atlanta and credited to the account of the Atlantic National Bank of Jacksonville.

The Atlantic National Bank of Jacksonville was one of our regular correspondents and has been doing business with us, I think, from about the latter part of 1919. When we got the check referred to we sent it to the Federal Reserve Bank of Richmond for the credit of the Federal Reserve Bank of Atlanta, for our account. That is the arrangement we have with them. We call it direct sending. We advised the Atlantic National Bank that we had received this check upon our standard form of advice, which we use in case of all cash letters. This form of advice is as follows:

Form 32 40M-10-19.

ADVICE OF CREDIT.

Your Date	Your Number	Description	Exchange Amount	Total

Your account has credit as above.

Drafts and checks on a bank in town having no other bank may, in the absence of special instructions from the Depositor or Correspondent, be sent to such bank for collection. If the proceeds in cash or drafts, or checks on other banks, or other cash item, do not reach this bank, the credit given for them will be cancelled. The Bank receives drafts, cash items and checks on other Banks, as a forwarder for collection only without liability for sub-agents, upon the above conditions, to which the Depositor or Correspondent hereby agrees.

THE CITIZENS AND SOUTHERN BANK,
ATLANTA, GA.

ALL FOREIGN ITEMS CREDITED SUBJECT TO ULTIMATE PAYMENT.

"We have been using this form of advice for some time in dealing with the Atlantic National Bank.

On December 21st we received a wire from the Federal Reserve Bank of Richmond about the check for $9,000.00, which wire is as follows:

(36) December 21, 1920.

"Citizens & Southern Bank,
Atlanta, Ga.

Check nine thousand dollars on sixty six dash six thirty-nine your cash letter dated December eighth total seventy four thousand seven seventy three eleven unpaid. We charge your account see mail advice.

FEDERAL RESERVE BANK OF RICHMOND."

Paid
5:30 P. M.

We later received the following letter dated December 21st

FEDERAL RESERVE BANK OF RICHMOND,

RICHMOND, VA.

Accounting Department.

Dec. 21-20.

Citizens & Southern Bank,
Atlanta, Ga.

The items listed below were forwarded in due course to the drawee bank for payment, which sent us an exchange draft, which was dishonored upon presentation. We are making every effort to obtain prompt settlement, but, as in accordance with our collection contract, all items are credited subject to final payment in cash, we will be compelled to charge these items to your account, if payment for the draft held by us is not received.

Drawee	Date and total of your letter		Amount.
66-639	Dec. 8-20	$74,773.11	$9,000.00

In the latter part of December or first of January we had some correspondence, but no further advice, except that the Bank of Lumber Bridge was closed.

I believe we have received written permission from the Federal Reserve Bank of Atlanta to send checks directly to the Federal Reserve Bank of Richmond, but I cannot find the letter granting this permission. I have not looked very diligently for the letter. We have been exercising the privilege of direct sending for some time. I have looked in our files which we have in our new building, but I have not looked through the old files back of 1919. The old files are not very accessible, but not absolutely inaccessible. We have been sending cash letters and a great part of the items for collection directly to the Federal Reserve Bank of Richmond for the credit of the Federal Reserve Bank of Atlanta for our account for some time. When we send a check directly to the Federal Reserve Bank of Richmond, it is handled just as if we had sent it to the Federal Reserve Bank of Atlanta, and they had sent it to the Federal Reserve Bank of Richmond."

(37) The witness was here shown Circular G-133, issued by the Federal Reserve Bank of Atlanta, and dated March 19, 1920. So much of this circular as is relevant to the issues of this case reads as follows:

"DIRECT ROUTING:

Under certain conditions, member banks having a large volume of cash items payable in other Federal Reserve districts, may be permitted to route such items direct to the Federal Reserve Bank or branch serving the district where payable. Application for such privilege must be made by the parent bank, Atlanta, or the New Orleans Branch if you are located in the New Orleans zone."

"GENERAL:

In handling items for member banks, the Federal

Reserve Bank of Atlanta acts as agent only. It is understood that each member bank authorizes it to send checks for collection direct to banks on which checks are drawn, and except for negligence the Federal Reserve Bank of Atlanta assumes no liability until funds are actually in its hands, and is authorized to charge back any item for which it has not received final payment, including items lost in transit.

Referring to the said circular the witness states:

"I think our bank received a copy of that circular from the Federal Reserve Bank of Atlanta, but I don't think I ever signed the agreement on the circular, and I cannot state positively that we received the circular, but I know it is the circular sent by the Federal Reserve Bank of Atlanta to banks availing themselves of the collection facilities. I would not say I was familiar with the terms of the circular, but I know in a general way the terms of handling items by the Federal Reserve Bank.

Our bank is a branch of the Citizens & Southern Bank of Atlanta, Ga.

CROSS EXAMINATION.

"If I ever received any permission to send items directly to the Federal Reserve Bank of Richmond, I think that permission would have been in writing, and I have no definite recollection as to whether or not such permission was ever received, but I think we must have had it or else we would not have sent the items directly. I cannot recall the document itself, if I ever saw it. Our bank is now in temporary quarters, and the old building is being renovated. I have not made a diligent search for the letter giving us permission to send directly. If any such permission was given in writing, it is my opinion that it is in the vault of the old building, and I have not searched there.

When we advised the Federal Reserve Bank of Atlanta that we had sent to Richmond a letter containing the check of Balfour, we did not describe the items in the (38) letter, but merely gave the total amount. The Federal Reserve Bank of Richmond deducted no charges for collecting our items, but credited the whole amount

to the Federal Reserve Bank of Atlanta, for our account on a deferred schedule, that is to say we did not receive actual credit until a sufficient time had elapsed until the items should have been paid, which should have been about five days after the letter left Atlanta. If the item was not actually collected it was to be charged back to our account as unpaid. The form of advice of credit, which I stated was sent to the Atlantic National Bank of Jacksonville by us, was in general use by us at that time for all of our cash letters. I have no definite recollection of the advice sent on the particular occasion; but it was our custom to always use this form for cash letters. The original advice sent out in this particular case is or should be in the hands of the Atlantic National Bank of Jacksonville. It is not in our possession. The first thing we heard about the letter containing the check for $9,000.00 was the telegram, to which I referred. We had received no other advice, except a general acknowledgment of our letter. Our cash letter to the Federal Reserve Bank of Richmond was dated Dec. 8th. We heard nothing concerning the check for $9,000.00, except a general advice of credit covering the letter containing it, until December 21st. It seemed rather a long time to us for them to report an item of this kind, and I so complained to the defendant bank.

I have no independent recollection of having received No. G-133."

RE-DIRECT EXAMINATION.

"I feel sure that we had permission from the Federal Reserve Bank of Atlanta to send these cash letters, about which I have testified, directly to the Federal Reserve Bank of Richmond, or else it would not have received them from us, and I feel sure that we would not have sent them without permission."

RE-CROSS EXAMINATION.

"So far as I know up to that time there was no written agreement between the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank of Atlanta by which the Citizens & Southern Bank of Atlanta agreed in sending items direct to the Federal Reserve Bank of

Richmond to be bound by any contract or agreement with reference to such items as between the Federal Reserve Bank of Atlanta and the Federal Reserve Bank of Richmond."

(39) M. W. BELL, a witness for the defendant, being duly sworn, deposes and says as follows:

"My name is M. W. Bell. I am Cashier of the Federal Reserve Bank of Atlanta, and have been such since December, 1918. Circular G-133 was prepared for the purpose of affording information to all member banks as to the sysctem or method used by the Federal Reserve Bank of Atlanta in collecting checks drawn on banks in our district and in other districts, and states the terms and conditions upon which we would accept checks for collection. So far as our records show, it was sent to all member banks. I supervised the preparation of that circular. The circulars were sent out by the Transit Department of the Federal Reserve Bank of Atlanta. In my capacity as Cashier, I have general supervision of that department. According to the best of my knowledge, it was sent to all member banks. I have looked through our files, but I find no acknowledgment of its receipt by the Citizens & Southern Bank of Atlanta, but we received an acknowledgment from the Citizens & Southern Bank of Savannah, signed by W. B. Spann, Jr., who is Assistant Cashier. The acknowledgment is not dated, but it is identified with the circular by the terms of acknowledgment itself, and was received in the regular course of mail. This acknowledgment with the Citizens & Southern Bank of Savannah is as follows:

Federal Reserve Bank of Atlanta,

Atlanta, Ga.

Gentlemen:

Receipt is acknowledged of your Circular No. G-133, and the terms and conditions set forth therein are hereby agreed to.

Yours very truly,

CITIZENS & SOUTHERN BANK.

Name of Bank
Savannah, Ga.

City
Attached to letter dated

Date
March 20, 1920.

By W. B. SPANN, JR., Cashier.
Duly authorized officer showing title.

"We also received in the regular course of mail a letter from the Citizens & Southern Bank of Savannah, dated March 23, 1920, asking for several copies of the letter." The letter is as follows:

"CITIZENS & SOUTHERN BANK.

(40) Member National Reserve System.

SAVANNAH, GA.

March 23, 1920.

Mr. W. R. Patterson, Asst. Cashier,
Federal Reserve Bank,
Atlanta, Ga.

Dear Sir:

We would appreciate you sending us several copies of your Circular G-133 so that we can leave one with our Transit Department, and other departments requiring information contained in this circular.

Yours very truly,

W. B. SPANN, JR.,
Asst. Cashier.

S.

We furnished copies of the circular, mailing them to Savannah.

"The Citizens & Southern Bank of Atlanta is a branch of the Citizens & Southern Bank of Savannah. When items are sent directly from a member bank in

our district to a Federal Reserve Bank in another district, they are handled just as though they had been sent by a member bank to its own Federal Reserve Bank, and by that bank sent to the other Federal Reserve Bank, and they are sent merely for the purpose of saving double handling and time. The member bank usually gets credit immediately on the day that the Federal Reserve Bank of the district to which the items are sent affects their collections in actual cash or its equivalent, the member bank getting credit on the books of the Federal Reserve Bank of its own district, and the accounts as between the Federal Reserve Banks themselves are cleared through the gold settlement fund. The privilege of direct sending was extended to all member banks upon the same terms. There was no specific form for the permission, but the member bank was merely advised by letter that in conformity with their request they were given the privilege of direct routing. The Citizens & Southern Bank had been availing themselves of this direct sending privilege to a very large extent before the latter part of 1920. It was, in fact, their common practice. I know they had the privilege before November, 1920; our records indicate that it was extended to them before August, 1919, presumably by letter. I have searched in our files for the letter and cannot find it, though I believe there is a copy in our files."

(41) CROSS EXAMINATION.

"I have no personal knowledge of the sending of Circular G-133. I only know that I gave directions that it be sent to all member banks, and my conclusion that it was so sent was based on my confidence and the fidelity of our employees. We have the written acknowledgment of the Citizens & Southern Bank of Savannah, and also the letter from W. B. Spann, Jr., Assistant Cashier, requesting that several additional copies of the circular be sent them. The copies of the circular were mailed to Savannah.

The Citizens & Southern Bank is a corporation chartered under the laws of Georgia, and has branches in Macon, Augusta and Atlanta. Originally its home office was in Savannah. The Citizens & Southern Bank was originally the Third National Bank of Atlanta, but the

Citizens & Southern Bank bought out the Third National Bank of Atlanta. The particular bank located in Atlanta has officers and directors of its own, who control its affairs.

If the Citizens & Southern Bank did not receive a copy of the circular it was an oversight. We deal with this bank as though it was a separate entity. We deal direct with the Citizens & Southern Bank of Atlanta, and directly with the Citizens & Southern Bank at Savannah, and, when a member bank of this Federal Reserve District dealt directly with the Federal Reserve Bank of Richmond for collection of cash items, that it was customary at that time for the member bank in this district to send the Federal Reserve Bank at Atlanta a copy of the cash letter; and that the advice of the Federal Reserve Bank of Atlanta received was of the general character showing whether the items were drawn on banks situated in Richmond or drawn upon banks in that district outside of Richmond. When items are sent by one of our member banks to a Federal Reserve Bank in another district, we do not wait for an advice from that other Federal Reserve Bank. We give credit to our member bank upon the day upon which the money should be available. In this case the money should have been available in four days after they left Atlanta, and we would credit the member bank and advise them. We gave them no other advice. If for any reason one of the items in the letter was not paid it would be customary for the Federal Reserve Bank of Richmond to notify the member bank directly, and also to advise us that the item was unpaid and charge the unpaid item back to us. It is necessary for us to be advised of that fact at least. I do not know whether we received any such advice in this case—I have not looked it up. In this case the corre-
(42) spondence concerning the check of Napier H. G. Balfour, so far as I know, has been carried on by the Federal Reserve Bank of Richmond and the Citizens & Southern Bank of Atlanta. I have no record of having received any advice from the Federal Reserve Bank of Richmond of its failure to collect the $9,000.00 check made by Napier H. G. Balfour to Malloy Bros. on the Bank of Lumber Bridge. I presume our records show it, but personally I have not looked it up.

"Circular G-133 was in force in December, 1920. When I stated above that items sent to the Federal Reserve Bank of Richmond would be available within four days after leaving Atlanta, I did not mean that they would necessarily be paid within that time, but the Federal Reserve Bank of Richmond gives credit for them within four days after leaving Atlanta, as that is the time ordinarily required to present the checks to banks upon which they are drawn. Some times it will take longer, especially if they receive in payment a check or draft drawn upon some other bank. We adopted four days as a uniform time for all Virginia points. Experience with the Federal Reserve Bank of Richmond was that it usually collected is some form for checks drawn on banks in its district withing three or four days after the checks were sent from Atlanta. By collected I mean that banks on which checks were drawn would have made remittance to the Federal Reserve Bank of Richmond in cash or exchange or something else acceptable to the Federal Reserve Bank of Richmond. If remittance was received in form of an exchange draft drawn on some other bank, it would increase the actual time for collection."

Further the witness deposed not.

The defendant, Federal Reserve Bank of Richmond, then produced and read in evidence the depositions of Edward Waller, Jr., T. A. Ratcliffe, J. Hammond Siler, L. A. Wingo, and J. Cabell Brockenbrough, taken after due notice before C. V. Blackburn, a notary public, at the office of the Federal Reserve Bank of Richmond, at Ninth & Franklin Street, in the City of Richmond, Virginia, which depositions were as follows:

DIRECT EXAMINATION.

T. A. RATCLIFFE, a witness of lawful age, being duly sworn, deposes as follows:

"My name is T. A. Ratcliffe, and I am twenty-five years of age. I am a bookkepper of the Federal Re-

serve Bank, having charge of the non-member ledgers."

(43) The witness was here shown a sheet taken from the ledgers of the Federal Reserve Bank of Richmond.

"The sheet which you show me was taken from one of the ledgers of the Federal Reserve Bank kept by me and shows the account between the Bank of Lumber Bridge and the Federal Reserve Bank. The Bank of Lumber Bridge was not a member of the Federal Reserve System, but in December, 1920, the Federal Reserve Bank of Richmond was accepting checks for collection drawn on the Bank of Lumber Bridge, and on the tenth day of December, 1920, we sent to the Bank of Lumber Bridge a cash letter containing checks aggregating $9,356.44. According to the time schedule we should have received a remittance for this letter on the 14th day of December. In this case we receivd a draft in settlements for the above mentioned letter on the 15th day of December. The amount of the draft was $9,204.90, the difference being occasioned by certain items in the letter which were returned to us unpaid."

CROSS EXAMINATION.

"I think a letter mailed in Richmond to the Bank of Lumber Bridge should reach Lumber Bridge on the next day, and it would take the same time for its return."

J. HAMMOND SILER, JR., a witness of lawful age, was called by the defendant, Federal Reserve Bank, and deposed as follows:

"My name is J. Hammond Siler, Jr., I am twenty-two years old. I am a Clerk for the Federal Reserve Bank of Richmond, and was employed in the Transit Department on or about December 14, 1920. It was my duty to attend to remittance drafts received from non-member banks if they were not paid when presented by us."

The following telegrams or carbon copies of telegrams were here shown to the witness:

Siler #1.

179NSED 23 COLLECT
GREENSBORO NC 728 P DEC 17 1920

FEDERAL RESERVE BANK
RICHMOND VA.

CHECK ON US BY BANK OF LUMBER BRIDGE NINETY TWO HUNDRED FOUR DOLLARS NINETY CENTS YOURS FIFTEENTH PROTESTED AND RETURNED NOT SUFFICIENT FUNDS.

ATLANTIC BANK AND TRUST CO. 734 P

Siler #2.

BANK OF LUMBER BRIDGE
(44) LUMBER BRIDGE NC

ATLANTIC BANK GREENSBORO ADVISES YOUR DRAFT NINETY TWO HUNDRED FOUR NINETY OUR ORDER NOT GOOD NOW. HAVE FUNDS WIRED GREENSBORO AT ONCE AND ADVISE US BY WIRE THAT YOU HAVE DONE SO. RUSH REPLY.

FEDERAL RESERVE BANK OF RICHMOND.
Paid—2:49
JHS

Siler #3.

96 MSN 29 COLLECT
GREENSBORO NC 122 P DEC 17 1920

FEDERAL RESERVE BANK
RICHMOND VA.

CHECK ON US BY BANK OF LUMBER BRIDGE NINETY TWO HUNDRED FOUR DOLLARS NINETY CENTS YOURS FIFTEENTH NOT GOOD NOW

SAYS WILL MAKE GOOD THIS AFTERNOON WE WILL ADVISE.

ATLANTIC BANK AND TRUST CO. 130 P

Siler #4.

A594D 5

LUMBER BRIDGE NC 435 P 17

FEDERAL RESERVE BANK OF RICHMOND
RICHMOND VA

YOUR WIRE MATTER BEING ADJUSTED.

BANK OF LUMBER BRIDGE.

"I caused to be sent such of the above mentioned telegrams as were signed by the Federal Reserve Bank, and received those which were addressed to it. To the best of my recollection the draft given by the Bank of Lumber Bridge on the Atlantic Bank & Trust Company in Greensboro was never paid by the Atlantic Bank & Trust Company in Greensboro."

DIRECT EXAMINATION.

L. A. WINGO, a witness of lawful age, produced by the Defendant Federal Reserve Bank of Richmond, being duly sworn, deposes as follows:

"My name is L. A. Wingo. I am twenty-six years of age. I was Manager of the Accounting Department of the Federal Reserve Bank of Richmond in December, 1920, and it was my duty to notify banks and others persons interested of the non-payment of the remittance drafts received in payment for cash letters sent by us (45) to non-member banks. Cash letters are letters containing checks which were received from correspondents, that is to say, from member banks throughout the system, and which checks are assembled in letters addressed to the bank upon which they are drawn and sent to it under one total."

The witness is here shown a list of checks contained in the letter of the Federal Reserve Bank of Richmond dated December 10th to the Bank of Lumber Bridge.

"It appears from the above mentioned sheets that in the letter sent by the Federal Reserve Bank of Richmond to the Bank of Lumber Bridge on December 10th there was contained a check for $9,000.00. This check was drawn upon the Bank of Lumber Bridge, and was received from the Citizens & Southern Bank of Atlanta. Our records do not show the name of the drawer, payee, or any endorser, except the Citizens & Southern Bank. When the draft which the Federal Reserve Bank of Richmond received from the Bank of Lumber Bridge in payment for its letter of December was dishonored, after presentation to the Atlantic Bank & Trust Co., Greensboro, I notified the banks whose items were in our letter of December 10th, and in particular I sent to the Citizens & Southern Bank of Atlanta the following telegram:

L. A. Wingo #2.

Dec. 21, 1920.

CITIZENS & SOUTHERN BANK,
ATLANTA, GA.

CHECK NINE THOUSAND DOLLARS ON SIXTY SIX DASH SIX THIRTY NINE YOUR CASH LETTER DATED DECEMBER EIGHTH TOTAL SEVENTY FOUR THOUSAND SEVEN SEVENTY THREE ELEVEN UNPAID. WE CHARGE YOUR ACCOUNT. SEE MAIL ADVICE.

FEDERAL RESERVE BANK OF RICHMOND.

PAID
5:30 P. M.

I also sent by mail a confirmation of this telegram, and sent a telegram to the Federal Reserve Bank of Atlanta."

Cross Examination.

"The above mentioned telegram was sent on December 21st. After sending the telegram, by error we sent to the Citizens & Southern Bank a notice on a lost item from stating that the check for $9,000.00 on the Bank of Lumber Bridge had been lost in the mails, which notice was sent on December 24th.

Direct Examination.

(46) J. Cabell Brockenbrough, a witness of lawful age, produced by the defendant, Federal Reserve Bank of Richmond, being duly sworn, deposes as follows

"My name is J. Cabell Brockenbrough. I am twenty-four years of age. I am a clerk employed in the Adjustment and Transfer Department of the Federal Reserve Bank of Richmond. After Mr. Wingo had dictated and sent the telegram dated December 21, 1920, to the Citizens & Southern Bank, I prepared slips for those items so that they could be charged back. By error, I used the form which we generally use when a check has been lost in the mails. The items were charged back on the 24th on lost item forms. One of these slips was sent to the Citizens & Southern Bank on December 24th, and afterwards the mistake was found out and a special letter was mailed to them. I do not know just when this special letter was mailed."

Counsel for defendant, Federal Reserve Bank, admits that this letter was mailed after December 24th.

Direct Examination.

Edward Waller, Jr., a witness of lawful age, produced by the defendant, Federal Reserve Bank of Richmond, being duly sworn, deposes as follows:

"My name is Edward Waller, Jr. I am thirty-one years of age, and am Assistant Cashier of the Federal Reserve Bank of Richmond, having general supervision

of the Transit, Bookkeeping, and Adjustment & Transfer Departments. I held this position on December 24, 1920. I received the following letter dated January 17th:

"THE CITIZENS AND SOUTHERN BANK
Atlanta, Ga.

January 17, 1921.

Ed. Waller, Jr., #1.

Mr. Edw. Waller, Jr., Assistant Cashier,
Federal Reserve Bank of Richmond,
Richmond, Va.

Dear Sir:—

We have your letter of December 30th regarding item of $9,000.00 on the Bank of Lumber Bridge, N. C. which we forwarded you in our letter of December 8th.

We notice that you state on December 17th your correspondent in Greensboro telegraphed you non-payment (47) of this remittance draft on the Bank of Lumber Bridge, however, you did not advise us that this item was unpaid until December 21st—four days later.

It appears to us that you should have wired us December 17th in order to give our endorser an opportunity to protect himself against paying out funds on this item, and we would appreciate an explanation regarding this so that we may pass it to our endorser.

Very truly yours,

(Signed) JNO. E. WALLACE,
JEW:W Assistant Cashier."

and sent the following reply:

"January 20, 1921.

Ed. Waller, Jr., #2.

Mr. Jno. E. Wallace, Assistant Cashier,
Citizens & Southern Bank,
Atlanta, Ga.

Dear Sir:

I have for acknowledgment your letter of January 17th, with further reference to item $9,000.00 on the Bank of Lumber Bridge, Lumber Bridge, N. C.

We must say that we disagree with you in that we should have telegraphed you on December 17th, advising non-payment of the remittance draft drawn on Greensboro, which included payment of the $9,000.00 item referred to by you. If it had been the item itself returned to us from the drawee bank, we, of course, should have wired you immediately, giving information that we had in hand, but inasmuch as it was the drawee bank's own draft on their correspondent which was unpaid, and further as we had no reason to suspect that there was anything wrong with the Bank of Lumber Bridge, we think it only fair that we should have communicated with them to see what explanation they had to offer before we attempted to advise the endorsers on the items represented by the draft in question.

I will venture to say that in ninety five per cent of the cases we have had where our non-member bank correspondent drafts are dishonored, they are later paid, and trouble of this nature is most often caused by delayed mails or an error of some kind which is immediately corrected as soon as it is brought to the drawing bank's attention.

We have a wire in our files from the Bank of Lumber Bridge received on December 18th, which was in reply to our wire to them of December 17th, stating that they had made arrangements to take care of their draft as requested in our telegram to them. In view of the circumstances surrounding this case, we do not see how you could have possibly expected advice of non-payment of your item before Monday, December 20th, and as previously explained, our only reason for not telegraphing you on that day was that we were using our every effort (48) to get in touch with the Lumber Bridge bank, but as we were unsuccessful, we began immediately looking up the endorsers on the checks represented by the remittance draft, and on Tuesday, the 21st, as you know,

we telegraphed you the non-payment of the item mentioned above.

Very truly your,

(Signed) ED. WALLER, JR.,
EW/W Assistant Cashier."

"Before the Bank of Lumber Bridge sent us the draft for $9,204.90 on Greensboro it had remitted with reasonable promptness and by means of a good draft for checks sent to it. When we sent items to Lumber Bridge, we expected to receive an answer three days after mailing the letter. We publish a time schedule showing the usual time for collection throughout our district, but we do not publish time schedules for individual banks. The Citizens & Southern Bank is a member of the Federal Reserve System.

I have been in the banking business since February, 1910. The business of check collecting is handled by the Federal Reserve Bank in a way very similar to that in which it is handled by collecting banks throughout the country. When one bank receives checks on another in a distant city, it usually sends them to the bank upon which they are drawn or to some other bank in that city, (49) and receives settlement by means of an exchange draft drawn by the bank to which the checks are sent upon some one of its correspondents. When checks are sent with the expectation that the bank receiving them will remit at once, we call it sending for collection and return. When this is done, the bank upon which the checks are drawn is expected to cancel the checks and charge them to the accounts of the drawers and to remit by means of its exchange draft or by a shipment of currency. An exchange draft is used more frequently than a shipment of currency.

Prior to December 14, 1920, we had no reason to suspect the insolvency of the Bank of Lumber Bridge. Remittance drafts given by small banks in settlement for cash letters are frequently dishonored on their first presentation and paid the following day.

The Fifth Federal Reserve District, in which the Federal Reserve Bank of Richmond is located, consists of a portion of the State of West Virginia, Virginia,

Maryland, District of Columbia, and the State of North Carolina and South Carolina. The Federal Reserve Bank of Richmond collects checks on banks throughout this district, and some times sends representatives to all parts of the district to see about collections. It has no regular office except at Richmond and Baltimore."

Further this witness deposeth not.

DIRECT EXAMINATION.

The defendant, Federal Reserve Bank, further maintains the issue joined, called as witness D. M. HALE, who, being duly sworn, testified as follows:

"I am an employee of the Federal Reserve Bank, and it is my duty to visit banks throughout this district for the purpose of making agreements with them under which they undertake to remit for checks sent them by the Federal Reserve Bank of Richmond, and also to visit them when they failed to remit promptly. Some time about the first of October, 1920, I went to Lumber Bridge and called on Mr. Covington, the Cashier of the Bank of Lumber Bridge. He said that he did not wish to sign any agreement to remit for checks at that time, but that when we undertook to collect checks on all other banks in North Carolina we could send him his checks and he would remit for them. I told him he could remit either by a draft or shipment of currency at our expense.

I again visited the Bank of Lumber Bridge on the morning of December 20th. A draft given by the Bank of Lumber Bridge had been returned unpaid by the (50) Greensboro bank, and I went to see if I could get a settlement. I saw Mr. Covington, the Cashier of the Bank of Lumber Bridge. He told me that he could not pay the draft which we held. He had in his bank some checks which we had sent him and which he had not cancelled. I got him to return these checks to me and asked him if he could pay them, and he said no. I told him that I would take them and he said all right. He said he hoped to make an arrangement to pay them the next day. The directors were having a meeting that night and he expected that if they would sign a guarantee he could borrow some money to take care of the checks. He

asked me to give him a little time. The next morning Mr. Covington met me and told me that some of his directors would not sign the guarantee, so I got a notary and had some checks on the Bank of Lumber Bridge which I had with me protested."

Counsel for Federal Reserve Bank produced a draft for $9,204.90, stating that it had been filed with the receiver of the Bank of Lumber Bridge under stipulation of counsel that such filing should be without prejudice to either party.

The witness is here shown the draft which is as follows and endorsed as follows:

ATLANTIC BANK & TRUST COMPANY 66-60

5

GREENSBORO, N. C. Dec. 14, 1920 No. 439.

Pay to the Order of Federal Reserve Bank $9,204.90
PAY $9204 AND 90 CTS.....DOLLARS

(SIGNED) G. W. COVINGTON,
Ass't Cashier.

Endorsed on face of check as follows:

Protested for non-payment
C. E. Fleming
Not. Public
Guilford Co.
Dec. 17 20.

My com.
Ex. 4 13 22

Endorsed on back of check as follows:

Pay to the Order of Any Bank, Banker or Trust Company All Prior Endorsements Guaranteed Dec. , 1920.

ATLANTIC BANK & TRUST CO.
Greensboro, N. C.

66-60 JNO. W. SIMPSON CASHIER 66-60

Pay to the Order of any Bank, Banker of Trust Company Prior Endorsements Guaranteed

68-3 Dec. 15, 1920 68-3

FEDERAL RESERVE BANK OF RICHMOND.

"My recollection is that I had this draft with me (51) when I talked to Mr. Covington and that I demanded payment of it, but that Mr. Covington told me that he had no funds. I have been in the banking business about six or seven years, and have been with the Federal Reserve Bank in its Bank Relations Department since April, 1920. It is not unusual for remittance drafts sent us by small banks to be dishonored.

There was only one bank in the town of Lumber Bridge. I could not get the check for $9,000.00 drawn by Mr. Balfour from the Bank of Lumber Bridge, because it had been cancelled and charged to Mr. Balfour's account. I suppose it had been because I had the draft for $9,204.90 covering the letter in which the $9,000.00 check had been sent. I left Lumber Bridge on the night of December 21st. When I left the Bank of Lumber Bridge was still open."

DIRECT EXAMINATION.

E. M. JOHNSON, a witness being duly sworn, deposes and testifies as follows:

"My name is E. M. Johnson. I am receiver of the Bank of Lumber Bridge. The bank was closed on the 24th, and I was appointed receiver on the 28th. When I took charge there was about $1,395.00 in cash in the vault, but about $200.00 or $300.00 of it was in checks or other irregular items carried as cash. The bank had on deposit with other banks as follows: About $3,500.00 with the National Bank of Fayetteville, and about $16.00 in one of the Richmond banks. There was some balance in the Atlantic Bank & Trust Company, Greensboro, but I don't remember the exact amount. I will produce and

file a statement showing the transactions between the Atlantic Bank & Trust Company, Greensboro, and the Bank of Lumber Bridge between December 14th and December 24th, 1920."

The statement above referred to is as follows:

Transactions with the Atlantic Bank & Trust Company, Greensboro, N. C., by the Bank of Lumber Bridge, Lumber Bridge, N. C., from December 14th to December 24th, 1920.

Debits.

December 13th, 1920		Balance,	$3,468.44
	15th, "	Cash Letter,	3,000.00
	17th, "	" "	809.90
			$7,278.34

Credits.

The following was credited to the account of the Atlantic Bank & Trust Company by the Bank of Lumber Bridge. (Other than for drafts issued.)

December 14th, 1920	Return items		$25.25
(52)	15th, "	" "	66.31
	17th, "	" "	1.30
			$92.86

Total debits.	$7,278.34
Less deductions for return items.	92.86
Balance.	$7,185.48

The following drafts were issued by the Bank of Lumber Bridge, Lumber Bridge, N. C., on the Atlantic Bank & Trust Company, Greensboro, N. C., on or after December 14th, 1920, and were paid:

Dec. 14th, 1920 #440, payable to The State Bank, Laurinburg,	$ 204.68

"	"	"	#441, payable to W. B. & T. Co., Winston-Salem,	124.75
"	"	"	#442, payable to J. H. Hightower, Cashier, Raleigh,	133.87
"	15th,	"	#443, payable to Federal Reserve Bank, Richmond,	635.32
"	16th,	"	#444, payable to Federal Reserve Bank, Richmond,	906.88
"	17th,	"	#445, payable to National Bank, Fayetteville,	2,000.00
"	23rd,	"	payable to "Cash" at 1st Nat. Bank, Lumberton,	1,000.00
"	20th,	"	payable to "Cash" at Atlantic Bk. & Tr. Co., Greensboro,	1,000.00

Total of drafts that were drawn and paid on or after Dec. 14th, 1920, $6,005.50

Draft #439, dated Dec. 14th, 1920, for $9,204.90 in favor of the Federal Reserve Bank, of Richmond, Va., was returned unpaid.

The following was credited to the account of the Atlantic Bank & Trust Company by the Bank of Lumber Bridge as a payment on the indebtedness. (Bills payable) of the same bank:

December	17th, 1920, Payement on note,	$ 680.00
"	18th, 1920, Payment on note,	353.43
	Total payments on note,	$1,033.43

Summary of credits.

Total of payments on note after Dec. 14th, 1920.	$1,033.43
Total of drafts drawn and paid on or after Dec. 14th, 1920.	6,005.50
	$7,038.93
Total debits.	$7,278.34

E. M. JOHNSON.

Credit for return items.	$ 92.86	
Credit for drafts issued and paid. .	6,005.50	
Credit for payment on note.	1,033.43	
Total.	7,131.79	
Less total credits.		$7,131.79
Balance.		$ 146.55

The above was all of the material testimony of the evidence introduced by the plaintiff and by both defendants. At the conclusion of the testimony, all parties having duly waived a jury and submitted all questions of law and fact to the court upon the stipulation that the findings of the court should have like force and effect as the jury, the plaintiff moved the court to find the facts and give judgment upon the uncontradicted evidence in its favor, and each defendant moved the court to find the facts and give judgment upon the uncontradicted evidence in its favor. The court, having duly considered the matter, found the facts and filed a statement of the facts found and the opinion of the court, which state-
(53) ment and opinion appear elsewhere in the record, and is here referred to and made a part of this bill as though it was here set forth in full. The defendant, Federal Reserve Bank, excepted to the said findings of fact and to the refusal of the court to find the facts and give judgment in its favor upon the uncontradicted evidence, whereupon the court entered judgment against the defendant, Federal Reserve Bank of Richmond, and in favor of the plaintiffs, and entered judgment in favor of the defendant, Napier H. G. Balfour, to which judgment the defendant, Federal Reserve Bank of Richmond excepted and tenders this its bill of exception, praying that the same may be signed, sealed and made a part of the record, which is accordingly done.

Given under my hand this 9th day of Dec., 1922.

H. G. CONNOR,
Judge of the United States District Court for the
Eastern District of North Carolina.

BILL OF EXCEPTIONS NO. 2.

(54) Filed Mar. 9, 1923.

Be it remembered that upon the trial of this case to maintain the issue joined, and especially to establish the custom and usages followed by Federal Reserve Banks and other banks throughout the country at large, and throughout the States of Virginia and North Carolina in particular, and to show that it was a custom to send checks directly to the banks upon which they were drawn and to accept an exchange draft from such banks in settlement for the checks so sent to it, the defendant, Federal Reserve Bank of Richmond, read in evidence the deposition of one Edward Waller, Jr., who testified as follows:

"I am thirty-one years of age, and am Assistant Cashier of the Federal Reserve Bank of Richmond, having general supervision of the Transit, Bookkeeping, and Adjustment & Transfer Departments. I held this position on December 24, 1920 . . . . .

I have been in the banking business since February, 1910. The business of check collecting is handled by the Federal Reserve Bank in a way very similar to that in which it is handled by collecting banks throughout the country. When one bank receives checks on another in a distant city, it usually sends them to the bank upon which they are drawn or to some other bank in that city, and receives settlement by means of an exchange draft drawn by the bank to which the checks are sent upon some one of its correspondents. When checks are sent with the expectation that the bank receiving them will remit at once, we call it sending for collection and return. When this is done, the bank upon which the checks are drawn is expected to cancel the checks and charge them to the accounts of the drawers and to remit by means of its exchange draft or by a shipment of currency. An exchange draft is used more frequently than a shipment of currency."

The defendant, for the purpose of proving that it had received the check mentioned in this suit for the account and credit of the Federal Reserve Bank of At-

J. E. WALLACE.

lanta, read in evidence the deposition of J. E. WALLACE, who testified that he was Assistant Cashier of the Citizens & Southern Bank of Atlanta, Ga., and, upon the subject of the previous usages and dealings between the (55) Federal Reserve Bank of Richmond and the Federal Reserve Bank of Atlanta, testified as follows:

"I am Assistant Cashier of the Citizens & Southern Bank of Atlanta, and have been such since January, 1920. I have general charge of the Transit and Accounting Departments, through which department checks sent us for credit pass. I know that the check for $9,000.00 drawn by Napier H. G. Balfour on the Bank of Lumber Bridge was received by the Citizens & Southern Bank of Atlanta and credited to the account of the Atlantic National Bank of Jacksonville. The Atlantic National Bank of Jacksonville was one of our regular correspondents and has been doing business with us I think from about the latter part of 1919. When we got the check referred to we sent it to the Federal Reserve Bank of Richmond for the credit of the Federal Reserve Bank of Atlanta, for our account. That is the arrangement we have with them. We call it direct sending." . . . .

"I believe we have received written permission from the Federal Reserve Bank of Atlanta to send checks directly to the Federal Reserve Bank of Richmond, but I cannot find the letter granting this permission. I have not looked very diligently for the letter. We have been exercising the privilege of direct sending for some time. I have looked in our files which we have in our new building, but I have not looked through the old files back of 1919. The old files are not very accessible, but not absolutely inaccessible. We have been sending cash letters and a great part of the items for collection directly to the Federal Reserve Bank of Richmond for the credit of the Federal Reserve Bank of Atlanta for our account for some time. When we send a check directly to the Federal Reserve Bank of Richmond, it is handled just as if we had sent it to the Federal Reserve Bank of Atlanta and they had sent it to the Federal Reserve Bank of Richmond." . . . .

CROSS EXAMINATION.

"If I ever received any permission to send items directly to the Federal Reserve Bank of Richmond, I think that permission would have been in writing, and I have no definite recollection as to whether or not such permission was ever received, but I think that we must have had it or else we would not have sent the items directly. I cannot recall the document itself, if I ever saw it. Our bank is now in temporary quarters and the old building is being renovated. I have not made a diligent search for the letter giving us permission to send directly. If any such permission was given in writing, it is my opinion that it is in the vault of the old building, and I have not searched there."

The defendant, Federal Reserve Bank of Richmond, likewise read in evidence the deposition of M. W. BELL, Cashier of the Federal Reserve Bank of Atlanta, who, upon the subject of the previous dealings between the Federal Reserve Bank of Atlanta and the Federal Reserve Bank of Richmond and the Citizens & Southern Bank of Atlanta, testified as follows:

(56) "When items are sent by one of our member banks to a Federal Reserve Bank in another district, we do not wait for an advice from that other Federal Reserve Bank. We give credit to our member bank upon the day upon which the money should be available. In this case the money should have been available in four days after they left Atlanta, and we would credit the member bank and advise them. We gave them no other advice. If for any reason one of the items in the letter was not paid, it would be customary for the Federal Reserve Bank of Richmond to notify the member bank directly, and also to advise us that the item was unpaid and charge the unpaid item back to us. It is necessary for us to be advised of that fact at least. I do not know whether we received any such advice in this case—I have not looked it up. In this case the correspondence concerning the check of Napier H. C. Balfour, so far as I know, has been carried on by the Federal Reserve Bank of Richmond and the Citizens & Southern Bank of Atlanta.

J. H. MALLOY.

I have no record of having received any advice from the Federal Reserve Bank of Richmond of its failure to collect the $9,000.00 check made by Napier H. G. Balfour to Malloy Bros. on the Bank of Lumber Bridge. I presume our records show it but personally I have not looked it up."

RE-DIRECT EXAMINATION.

"Circular C-133 was in force in December, 1920. When I stated above that items sent to the Federal Reserve Bank of Richmond would be available within four days after leaving Atlanta, I did not mean that they would necessarily be paid within that time, but the Federal Reserve Bank of Richmond gives credit for them within four days after leaving Atlanta, as that is the time ordinarily required to present the checks to banks upon which they are drawn. Some times it will take longer, especially if they receive in payment a check or draft drawn upon some other bank. We adopted four days as a uniform time for all Virginia points. Experience with the Federal Reserve Bank of Richmond was that it usually collected in some form for checks drawn on banks in its district within three or four days after the checks were sent from Atlanta. By collected I mean that banks on which checks were drawn would have made remittance to the Federal Reserve Bank of Richmond in cash or exchange or something else acceptable to the Federal Reserve Bank of Richmond. If remittance was received in form of an exchange draft drawn on some other bank, it would increase the actual time for collection."

The plaintiffs and the defendant, Napier H. G. Balfour, introduced no evidence in contradiction of the above testimony, but produced and examined as a witness J. H. MALLOY, one of the plaintiffs, who testified in part as follows:

"The check contains on its face a stamp reading "No-protest 63-131." I do not remember whether I waived protest on the check, but I did not put the stamp on it. I do not know whether the number is what is

called the transit number of the Perry Banking Company or not. I know very little about the workings of a bank. I did not know that every bank was known by a certain number. I understand from Mr. Scales that the Perry Banking Company sent this check to the Atlantic National Bank of Jacksonville, and that from there it was sent to Atlanta, but I do not know of my own knowledge what happened to the check after it was de-
(57) posited by us with the Perry Banking Company. I know that the words "No-protest" mean that the check should not be protested, but I did not give the Perry Banking Company any instructions about not protesting the check, but just sent them the check for credit."

There was no evidence showing or tending to show that the plaintiffs, D. J. Malloy and J. H. Malloy, or either of them, knew anything of the usuages or customs of banks in collecting checks delivered to them for collection or knew anything concerning the previous methods of dealing between the Federal Reserve Bank of Richmond and the Federal Resrve Bank of Atlanta and the Citizens & Southern Bank of Atlanta.

At the conclusion of the testimony of this case, all questions of law and fact having been submitted to the court for determination without a jury, the court having heard argument of counsel and considered the matter, filed herein a written statement of facts and its opinion thereon, which statement of facts and opinion is in part as follows:

"There is no evidence of any custom existing either in Virginia or North Carolina, by which collecting banks are authorized to accept from their agents or subagents, or from the drawee banks in settlement of collections sent them, anything other than money in settlement of such collections. Plaintiff, J. H. Malloy, testified that he was engaged in the lumber business and knew 'very little about the workings of a bank—did not instruct the Perry Banking Co.—just sent the check down there for credit during the course of business."

The defendant, Federal Reserve Bank of Richmond, duly excepted to the said findings of fact, and especially

to the above quoted portion thereof, for that the finding that there was no evidence of a custom existing either in Virginia or North Carolina, by which collecting banks are authorized to accept from their agents or sub-agents, or from the drawee bank, in settlement for collections sent them, anything other than money in settlement for such collections was contrary to the uncontradicted evidence in this case as above set forth; and also for that it is immaterial whether or not such custom was known to the plaintiffs, in that it appeared from the uncontradicted evidence that such customs were known to the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank of Atlanta, Ga., from which the defendant, Federal Reserve Bank of Richmond, received this check, that the court, nevertheless, entered judgment in favor of the plaintiffs against the Federal Reserve Bank (58) of Richmond and in favor of the defendant, Napier H. C. Balfour, and the defendant, Federal Reserve Bank of Richmond, now tenders this its bill of exception and prays that the same be signed, sealed and made a part of the record.

Given under my hand this 9th day of Dec., 1922.

H. G. CONNOR,
Judge of the United States District Court for the Eastern District of North Carolina.

BILL OF EXCEPTIONS NO. 3.

(59) Filed Mar. 9, 1923.

Be it remembered that upon the trial of this case and after the court had found the facts and announced its opinion, which statement of the facts and opinion is elsewhere set forth in this record, but is here referred to and made a part of this bill of exceptions as though it were here set forth in full, the defendant, Federal Reserve Bank, objected to the entry of judgment upon the said findings of fact and opinion of the court for the reason that it appeared that upon the facts as found by the court the defendant, Federal Reserve Bank, was not

liable to the plaintiff. The court overruled the said objection and entered judgment against the defendant, Federal Reserve Bank, and in favor of the plaintiff and the defendant, Napier H. G. Balfour, to which ruling and judgment the said defendant duly excepted, and tenders this its bill of exceptions and prays that the same may be signed, sealed and made a part of the record, which is accordingly done.

Given under my hand this 9th day of Dec., 1922.

H. G. CONNOR,
Judge of the United States District Court for the Eastern District of North Carolina.

ASSIGNMENT OF ERRORS.

(60) Filed Mar. 9, 1923.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA.
AT RALEIGH.

D. J. Malloy & J. H. Malloy, Partners, trading as Malloy Brothers,
vs.
Federal Reserve Bank of Richmond and Napier H. G. Balfour.
} Assignment of Errors.

Comes now the Federal Reserve Bank of Richmond and files the following assignment of errors in which it will rely in the prosecution of a writ of error in the above entitled cause.

1. The trial court erred in refusing to find in favor of the defendant, Federal Reserve Bank of Richmond and to give judgment in its favor, for that it appeared from the uncontradicted evidence in said case that the defendant, Federal Reserve Bank of Richmond, was in no way liable to the plaintiffs.

2. The trial court erred in finding as follows:

"There is no evidence of any custom existing either in Virginia or North Carolina, by which collecting banks are authorized to accept from their agents or subagents, or from the drawee banks in settlement of collections sent them, anything other than money in settlement of such collections. Plaintiff, J. H. Malloy, testified that he was engaged in the lumber business and knew 'very little about the workings of a bank—did not instruct the Perry Banking Co.—just sent the check down there for credit during the course of business.'"

For that the uncontradicted testimony of Edward Waller, Jr., showed that such a custom existed among and was generally known to all Federal Reserve banks and commercial banks engaged in the business of collecting checks, and the uncontradicted testimony of M. W. Bell and J. E. Wallace, showing that such custom was known to the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank of Atlanta, Georgia, which were acting as the agent for the plaintiff.

3. The trial court erred in entering judgment upon the facts as found, for that it appeared from said facts so found that the defendant, Federal Reserve Bank of Richmond, was in no way liable to the plaintiffs.

Wherefore, the Federal Reserve Bank of Richmond prays that the record and proceedings in the said case may be reviewed and the judgment entered therein may be reversed.

FEDERAL RESERVE BANK OF RICHMOND.

By Counsel,

M. G. WALLACE.

STIPULATION FOR MAKING UP RECORD.

(61) Filed March 9, 1923.

It is hereby stipulated and agreed that the following portions portions of the record and proofs in the above entitled case shall be printed in the transcripts of the record for use in the United States Circuit Court of Appeals for the Fourth Circuit:

1. The complaint of the plaintiffs.
2. The answer of both defendants.

3. Stipulation of counsel waiving trial by jury.

4. The statement of facts and opinion of the court.

5. The judgment of the Court.

6. Defendant, Federal Reserve Bank of Richmond, bills of exceptions.

7. Defendant, Federal Reserve Bank of Richmond, assignments of error.

8. This stipulation.

9. Memorandum of date of petition for writ of error.

10. Memorandum of date of order allowing writ of error.

11. Memorandum of date of writ of error and date when copy thereof was lodged in the office of the clerk of this district court.

12. Memorandum of the date, penalty, names of obligors, and condition of the appeal bond.

13. Memorandum of date of citation, and date of service thereof or waiver of service thereof.

(62) It is further stipulated and agreed that the clerk

of the district court shall make up a transcript of the record in the above styled cause, transmit the same to the clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, to be printed in accordance with rule 23 of that court.

M. G. WALLACE,
Counsel for Federal Reserve Bank of Richmond.
R. H. DYE,
Counsel for D. J. Malloy & J. H. Malloy.
J. BAYARD CLARK,
Counsel for Napier H. G. Balfour.

MEMORANDUM OF SECTION 7 OF RULE 14.

(63) (1) Petition for Writ of Error, filed March 9, 1923.

(2) Order Allowing Writ of Error, March 9, 1923.

(3) Writ of Error issued March 9, 1923.

(4) Citation. Dated March 9, 1923, and service of same accepted March 12, 1923, by R. H. Dye, Attorney for D. J. Malloy and J. H. Malloy and by J. Bayard Clark, Attorney for Napier H. G. Balfour.

(5) Writ of Error Bond, dated March 13th, 1923; Penalty $250.00; Obligors Federal Reserve Bank of Richmond and National Surety Company; Conditioned for damages and costs.

ORDER TO TRANSMIT RECORD.

(64) And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

Teste:

S. A. ASHE,
Clerk U. S. District Court.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
(65) Eastern District of North Carolina, ss:

I, S. A. Ashe, Clerk of the District Court of the United States for the Eastern District of North Carolina, at Raleigh, in and for said district, do hereby certify that the foregoing is a true and correct transcript of the record and proceeding in the matter of Federal Reserve Bank of Richmond, Plaintiff in error, vs. D. J. Malloy and J. H. Malloy, Partners trading as Malloy Brothers, Defendants in error, as the same appears from the records in my office.

Witness, my hand and official seal in the City of Raleigh, N. C., this 15th day of March, 1923.

S. A. ASHE,
(Seal of Court) Clerk U. S. District Court.

On the same day, to-wit: March, 22, 1923, the original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation, are certified up under Sec. 7 of Rule 14.

Same day, the appearance of M. G. Wallace is entered for the Plaintiff in Error.

March 30, 1923, twenty-five copies of the printed record are ~~filed~~ *filed*.

April 3, 1923, the appearance of Robert H. Dye and Branch & Snow is entered for the Defendants in Error.

ARGUMENT OF CASE.

May 24, 1923 (May Term, 1923,) cause came on to be heard before Woods and Waddill, Circuit Judges, and Groner, District Judge, and is argued by counsel and submitted.

OPINION.

Filed July 12, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 2106.

Federal Reserve Bank of Richmond, Plaintiff in Error,

versus

D. J. Malloy & J. H. Malloy, Trading as Malloy Brothers, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

(Argued May 24, 1923. Decided July 12, 1923)

Before Woods and Waddill, Circuit Judges, and Groner, District Judge.

M. G. Wallace (J. C. Little on brief) for Plaintiff in Error, and Robert H. Dye (Branch & Snow on brief) for Defendant in Error.

Waddill, Circuit Judge:

This action was instituted in the Superior Court of Cumberland County, North Carolina, by the defendants in error, D. J. Malloy and J. H. Malloy, partners doing business under the firm name of Malloy Brothers, citizens of the State of Georgia, against the plaintiff in error, the Federal Reserve Bank, of Richmond, a corporation organized under the act of congress known as the Federal Reserve Act, and Napier G. H. Balfour, a citizen and resident of Cumberland, North Carolina. The purpose of the suit was to recover from the plaintiff in error the sum of $9,000.00, the amount of a certain check drawn by the said Napier H. G. Balfour on the Bank of Lumber Bridge of Lumber Bridge, N. C., in favor of the defendants in error in payment of an indebtedness due them by said Balfour, secured upon real estate in Cumberland county. The check had been entrusted to plaintiff in error for collection in due course of its banking business, and the amount of which was lost to defendants in error, as claimed by them, by reason of the negligence and want of business care exercised by the plaintiff in error; the specific charge being that plaintiff in error

negligently mailed said check to the Bank of Lumber Bridge upon which it was drawn, which charged the same to the account of Balfour, the drawer, who had to his credit ample funds to meet the check, and negligently accepted in payment therefor a draft drawn by the Bank of Lumber Bridge on the Atlantic Bank and Deposit Company, of Greensboro, N. C., in favor of the Federal Reserve Bank of Richmond, the plaintiff in error, for said $9,000.00. This draft was not paid when presented, for lack of funds, and the Bank of Lumber Bridge in a few days suspended, and a receiver was appointed for it. Defendants in error further averred that plaintiff in error carelessly and negligently omitted to give them prompt and timely notice of the failure to receive the amount of said check sent it for collection, which would have enabled them to collect the same, and that the plaintiff in error was liable as well for its negligence in forwarding said check for $9,000.00 to the bank on which it was drawn, as for accepting something other than money therefor, which proved valueless.

The case was, by appropriate proceeding, removed to the United States District Court for the Eastern District of North Carolina where the same was docketed, duly matured, and issue joined upon the pleadings. A trial by jury was waived by written stipulation of parties by counsel duly filed, and all questions of law and fact submitted to the judge of the trial court for determination, all parties asking for findings of fact and judgment in their favor. After full consideration, the court found in favor of the defendants in error against the plaintiff in error, and also found in favor of the defendant Balfour, and rendered judgment against the plaintiff in error in favor of the defendants in error for $9,000.00, with interest and costs.

This writ of error is presented by the Federal Reserve Bank of Richmond, to review and reverse this judgment. The learned judge of the court below made a full and comprehensive finding of facts, the accuracy of which is conceded, and not challenged in any material respect, and upon the facts thus ascertained, rendered the opinion and judgment sought to be reviewed and reversed. (*Malloy Bros.* vs. *Federal Reserve Bank*, 281 Fed. 997.)

The assignments of error raise in substance the question of whether the district court erred in holding plaintiff in error guilty of negligence in the circumstances, and that it was without authority to receive in settlement of the check in its hands for collection, the draft accepted by it upon the Atlantic Bank and Trust Company, the taking of which resulted in the loss sued for.

After most careful consideration, we find ourselves in full accord with the court below upon the facts, if, indeed, it may be said that there is any real dispute about them, and we accept the able and comprehensive opinion of the judge of the district court as containing a clear and correct review of the law properly applicable to the case, and neither desire nor deem it necessary to add anything to what is there said.

The decision of the district court will be affirmed, with costs.

Affirmed.

JUDGMENT.

Filed and Entered July 12, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 2106.

Federal Reserve Bank of Richmond, Plaintiff in Error,

vs.

D. J. Malloy & J. H. Malloy, Trading as Malloy Brothers, Defendants in Error.

In Error to the District Court of the United States for the Eastern District of North Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of North Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

EDMUND WADDILL, Jr.
U. S. Circuit Judge.

July 12th, 1923.

ORDER STAYING MANDATE.

Filed August 9, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 2106.

Federal Reserve Bank of Richmond, Plaintiff in Error,

vs.

D. J. Malloy & J. H. Malloy, Trading as Malloy Brothers, Defendants in Error.

Error to the District Court of the United States for the Eastern District of North Carolina, at Raleigh.

The plaintiff in error in the above entitled case having made application for a writ of error,

It is Ordered that the mandate of this Court in the above case be, and the same is hereby, stayed pending the consideration of the said application for a writ of error.

EDMUND WADDILL, JR.,
U. S. Circuit Judge.

August 9th, 1923.

PETITION FOR WRIT OF ERROR.

Filed September 1, 1923.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT, AT RICHMOND.

Federal Reserve Bank of Richmond, Plaintiff in Error,

vs.

D. J. Malloy & J. H. Malloy, Partners, trading as Malloy Brothers, Defendants in Error.

The Federal Reserve Bank of Richmond, plaintiff in error in the above entitled cause, respectfully shows:

1. That this action was a suit of a civil nature arising under the laws of the United States, and especially under a certain Act of Congress known as the Federal Reserve Act, in that the plaintiff in error is and was a corporation organized and doing business under that Act, and the defendant in error sought to enforce against it a liability incurred, or alleged to have been incurred, in the course of its operation under the above mentioned Act of Congress and the Regulations of the Federal Reserve Board made in pursuance thereof. The jurisdiction of the District Court was invoked solely upon the above mentioned ground.

2. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of one thousand dollars; that is to say, the amount in controversy is the sum of $9,000.00 (nine thousand dollars), with interest from December 14, 1920, and costs, for which amount judgment was rendered by the District Court of the United States for the Eastern District of North Carolina, which judgment was affirmed by the United States Circuit Court of Appeals for the Fourth Judicial Circuit.

3. The said judgment is one in which the decision of the Circuit Court of Appeals is not made final by the laws of the United States, and the Federal Reserve Bank

of Richmond, plaintiff in error, desires to have the decision in the said case reviewed by the Supreme Court of the United States, because of the errors more particularly assigned and pointed out in the Assignment of Errors presented and filed with this petition, to which reference is hereby made.

Wherefore, the Federal Reserve Bank of Richmond respectfully prays that a writ of error be allowed to it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fourth Judicial Circuit to send the records and proceedings in this case, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors, herewith filed by the plaintiff in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And your orator, the Federal Reserve Bank of Richmond, will ever pray, etc.

FEDERAL RESERVE BANK OF RICHMOND.

By Counsel,

M. G. WALLACE.

ASSIGNMENT OF ERRORS.

Filed September 1, 1923.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT, AT RICHMOND.

Federal Reserve Bank of Richmond, Plaintiff in Error,

vs.

D. J. Malloy & J. H. Malloy, Partners, trading as Malloy Brothers, Defendants in Error.

Comes now the Federal Reserve Bank of Richmond, for the purpose of making application for a writ of error to the Supreme Court of the United States, and files

the following assignment of errors in the opinion and judgment of the United States Circuit Court of Appeals for the Fourth Judicial Circuit, delivered and entered on July 12, 1923, upon which assignment of errors it expects to rely in the prosecution of a writ of error to the Supreme Court of the United States in the above entitled cause.

1. The Circuit Court of Appeals erred in affirming the judgment entered by the District Court of the United States for the Eastern District of North Carolina, and in not reversing said judgment, for that it appeared from the uncontradicted evidence in the said case that the Federal Reserve Bank of Richmond, plaintiff in error, was in no way liable to the defendant in error, and the said District Court was moved to so find and rule, but the said District Court refused to so find and rule, and gave judgment against the plaintiff in error.

2. The Circuit Court of Appeals erred in failing and refusing to set aside the judgment entered by the District Court of the United States for the Eastern District of North Carolina, for that the said District Court found as follows:

"There is no evidence of any custom existing either in Virginia or North Carolina, by which collecting banks are authorized to accept from their agents or sub-agents, or from the drawee banks in settlement of collections sent them, anything other than money in settlement of such collections. Plaintiff, J. H. Malloy, testified that he was engaged in the lumber business and knew 'very little about the workings of a bank—did not instruct the Perry Banking Co.—just sent the check down there for credit during the course of business.'"

which finding made by the said District Court was wholly without evidence to support it and contrary to and in conflict with the facts as shown by the uncontradicted testimony of Edward Waller, Jr., M. W. Bell, J. E. Wallace, and others, from which testimony it appeared that there was a custom existing and generally known to all Federal reserve banks, commercial banks and others engaged in the business of collecting checks in Virginia,

North Carolina, and elsewhere, whereby banks made settlement with each other for collections sent to them by means of exchange drafts drawn upon their correspondents.

3. The Circuit Court of Appeals erred in affirming the judgment entered in this cause by the District Court of the United States for the Eastern District of North Carolina, and in not reversing said judgment, for that it appeared from the facts, as found and stated by the District Court of the United States for the Eastern District of North Carolina, that the Federal Reserve Bank of Richmond was in no way liable to the defendant in error; yet, nevertheless, the said District Court of the United States for the Eastern District entered judgment in favor of the defendant in error and against the plaintiff in error.

Because of the said errors the Federal Reserve Bank of Richmond prays that the order and judgment of the said Circuit Court of Appeals and of the District Court of the United States for the Eastern District of North Carolina, entered herein on July 12, 1923, may be reviewed by the Supreme Court of the United States and reversed.

FEDERAL RESERVE BANK OF RICHMOND.

By Counsel,

M. G. WALLACE.

ODER ALLOWING WRIT OF ERROR.

Filed September 1, 1923.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT, AT RICHMOND.

Federal Reserve Bank of Richmond, Plaintiff in Error,

vs.

D. J. Malloy & J. H. Malloy, Partners, trading as Malloy Brothers, Defendants in Error.

The foregoing petition is granted and a writ of error and *supersedeas* allowed, as prayed for, upon plaintiff in error giving bond, according to law, in the sum of $12,000.00.

It is further ordered that the record to be transmitted in this case shall be the same as the record upon which this case was heard in the Circuit Court of Appeals for the Fourth Judicial Circuit, together with a transcript of all proceedings had and taken in the said case in the said Circuit Court of Appeals and subsequent thereto, including the opinion of the said Circuit Court of Appeals. The Clerk of the said Circuit Court of Appeals shall transmit to the Clerk of the Supreme Court of the United States a transcript of the record made up as above stated.

Richmond, Va., Sept. 1st, 1923.

EDMUND WADDILL, JR.,
Judge of the United States Circuit
Court of Appeals for the Fourth
Circuit.

WRIT OF ERROR.

Issued September 1, 1923.

UNITED STATES OF AMERICA, SS:

The President of the United States,
To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the Federal Reserve Bank of Richmond, Plaintiff in Error, and D. J. Malloy & J. H. Malloy, Trading as Malloy Brothers, Defendants in Error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid,

in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 1st day of September, in the year of our Lord one thousand nine hundred and twenty-three.

CLAUDE M. DEAN,
Clerk of the United States Circuit Court
(Seal of Court) of Appeals for the Fourth Circuit.

Allowed by

EDMUND WADDILL, JR.,
Judge U. S. Circuit Court of Appeals,
Fourth Circuit

SERVICE OF WRIT OF ERROR.

The foregoing writ of error is served by lodging a copy thereof for the adverse party, on the first day of September, 1923, in the Clerk's Office of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, where the record remains.

Attest:

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals,
Fourth Circuit.

CITATION.

Issued September 1, 1923.

UNITED STATES OF AMERICA, SS:

The President of the United States,
To D. J. Malloy & J. H. Malloy, Trading as Malloy Brothers, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit, wherein Federal Reserve Bank of Richmond is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 1st day of September, in the year of our Lord one thousand nine hundred and twenty-three.

EDMUND WADDILL, JR.,
Judge of the United States Circuit
Court of Appeals for the Fourth
Circuit

SERVICE OF CITATION.

Delivery of a copy of the above citation acknowledged and legal service accepted this fifth day of September, 1923.

ROBERT H. DYE,
Attorney for D. J. & J. H. Malloy,
trading as Malloy Bros., defendants
in error

STIPULATION FOR MAKING UP RECORD.

Filed September 1, 1923.

In the United States Circuit Court of Appeals for the Fourth Judicial Circuit, at Richmond.

Federal Reserve Bank of Richmond, Plaintiff in Error,

vs.

D. J. Malloy & J. H. Malloy, Partners, trading as Malloy Brothers, Defendants in Error.

It is hereby stipulated and agreed by and between the Federal Reserve Bank of Richmond, plaintiff in error, by M. G. Wallace, its Counsel, and D. J. Malloy and J. H. Malloy, Partners, trading as Malloy Brothers, defendants in error, by R. H. Dye, their Counsel, that the following portions of the record in the above entitled case shall constitute the transcript of the record on writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Fourth Circuit, and that the clerk of that court shall transmit only the papers designated herein to the clerk of the Supreme Court of the United States as a return to the writ of error.

(A) Transcript of the record as printed in the United States Circuit Court of Appeals for the Fourth Circuit, containing:

(1) The complaint of the plaintiff.

(2) The answer of both defendants.

(3) Stipulation of Counsel waiving trial by jury.

(4) Statement of facts and opinion filed by the District Court of the United States for the Eastern District of North Carolina.

(5) Judgment of the District Court of the United States for the Eastern District of North Carolina.

(6) Bills of Exceptions taken by the Federal Reserve Bank of Richmond—Nos. 1, 2 and 3.

(7) Stipulation for making up record for return to writ of error from the United States Circuit Court of Appeals for the Fourth Circuit to the District Court of the United States for the Eastern District of North Carolina.

(8) Memorandum of date of petition for writ of error from the United States Circuit Court of Appeals for the Fourth Circuit to the District Court of the United States for the Eastern District of North Carolina.

(9) Memorandum of date of order allowing such writ of error.

(10) Memorandum of date of writ of error and date when copy thereof was lodged in the office of the clerk of the District Court.

(11) Memorandum of the date, penalty, and names of obligors, and condition of the appeal bond given upon suing out the writ of error from the United States Circuit Court of Appeals for the Fourth Circuit to the District Court of the United States for the Eastern District of North Carolina.

(12) Memorandum of date of citation and date of waiver of service.

(13) Order of District Court of the United States for the Eastern District of North Carolina, transmitting record to the United States Circuit Court of Appeals for the Fourth Circuit.

(14) Certificate of the Clerk of the United States District Court for the Eastern District of North Carolina.

(B) Opinion filed by the United States Circuit Court of Appeals for the Fourth Judicial Circuit, dated July 12, 1923.

(C) Order entered thereon.

(D) Assignment of Errors to judgment of the United States Circuit Court of Appeals for the Fourth Circuit.

(E) Petition for writ of error to United States Circuit Court of Appeals for the Fourth Circuit and order allowing the writ.

(F) Stipulation for making up the record to be certified by the Supreme Court of the United States.

(G) Bond executed by Federal Reserve Bank of Richmond, plaintiff in error, upon suing out writ of error to the judgment of the United States Circuit Court of Appeals for the Fourth Judicial Circuit.

Witness our hands this first day of August, 1923.

M. G. WALLACE,
Counsel for Federal Reserve Bank of Richmond.
ROBERT H. DYE,
Counsel for D. J. & J. H. Malloy.

WRIT OF ERROR AND SUPERSEDEAS BOND.

Filed Sept. 7, 1923.

Know all men by these presents, That we, The Federal Reserve Bank of Richmond, as principal, and National Surety Company, ... as sureties, are held and firmly bound unto D. J. Malloy and J. H. Malloy, partners, trading as Malloy Brothers in the full and just sum of Twelve thousand dollars, ($12,000.00) to be paid to the said D. J. Malloy and J. H. Malloy, partners, trading as Malloy Brothers, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 4th day of September, in the year of our Lord one thousand nine hundred and twenty-three.

Whereas, lately at a United States Circuit Court of Appeals for the Fourth Judicial Circuit in a suit depending in said Court, between Federal Reserve Bank

of Richmond, plaintiff-in-error, and D. J. Malloy and J. H. Malloy, partners, trading as Malloy Brothers, defendant-in-error, a judgment was rendered against the said Federal Reserve Bank of Richmond and the said Federal Reserve Bank of Richmond having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said D. J. Malloy and J. H. Malloy, partners, trading as Malloy Brothers, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from September 1, 1923.

Now, the condition of the above obligation is such, That if the said Federal Reserve Bank of Richmond, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FEDERAL RESERVE BANK OF RICHMOND,
By GEO. J. SEAY, Governor. (Seal)
NATIONAL SURETY CO., (Seal)
By ROBERT I. BOSWELL, Atty.-in-fact. (Seal)
(Seal of National Surety Co.)

Sealed and delivered in presence of—

M. G. WALLACE,
as to Federal Reserve Bank of Richmond.
(Seal of Federal Reserve Bank)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit, as to Natl. Surety Co.

Approved by—

EDMUND WADDILL, JR.,
Judge U. S. Circuit Court of Appeals,
Fourth Circuit.

F. 201½ 10M 7-18.

POWER OF ATTORNEY.

Filed with Writ of Error Bond.

Know all Men by These Presents, that the Natioanl Surety Company, a corporation duly organized and ex-

isting under the laws of the State of New York, and having its principal offices in the City of New York, hath made, constituted and appointed, and does by these presents make, constitute and appoint Robert I. Boswell, of Richmond, and State of Virginia its true and lawful Attorney, with full power and authority hereby conferred in its name, place and stead, to sign, execute and acknowledge any and all bonds required to be given in Court Proceedings or Actions at Law, not exceeding One Hundred Thousand ($100,000) Dollars each in amount and to bind the National Surety Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said Attorney pursuant to the power herein given. This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the second day of February, 1909.

"ARTICLE XII. Resident Officers and Attorneys-in-Fact.

"SECTION 1. The President, First Vice-President or any other Vice-President may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Company, and either the President, First Vice-President, or any other Vice-President, the Board of Directors or the Executive Committee may at any time remove any such Resident Vice-President, Resident Assistant Secretary or Attorney-in-Fact and revoke the power and authority given him.

"SECTION 4 Attorneys-in-Fact. Attorneys-in-Fact may be given full power and authority to execute for and in the name and on behalf of the Company, any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature of a bond, recognizance or conditional undertaking, and any such instrument executed by any such Attorney-in-Fact shall be as binding upon the Company as if signed by the President and sealed and attested by the Secretary."

And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March, A. D., 1912, a quorum being present, the following additional section to the foregoing By-Law was adopted:

"SECTION 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby authorized to verify any affidavit required to be attached to bonds, recognizances or contracts of indemnity, policies of insurance and all other writings obligatory in the nature thereof, and are also authorized and empowered to certify to a copy of any By-Law contained in Articles VI, XII and XIII of the By-Laws of the Company."

In Witness Whereof, the National Surety Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 30th day of October, A. D., 1922.

(Seal) NATIONAL SURETY COMPANY,
By J. L. MEE, Vice-President.

Attest:

M. CROOKE,
Assistant Secretary.

Stamps affixed to first original and duly canceled.

STATE OF NEW YORK,
County of New York, ss:

On this 30th day of October, A. D., 1922, before me personally came J. L. Mee to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument in such corporate seal; that it was so affixed by order of the Board of Directors of said cor-

poration, and that he signed his name thereto by like order.

M. M. MILLER,
Notary Public.

(Seal)

STATE OF NEW YORK,
County of New York, ss:

I, M. Crooke, Assistant Secretary of the National Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a power of attorney, executed by said National Surety Company, which is still in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Company, at the City of New York, this 30th day of October, A. D., 1922.

M. CROOKE,
Assistant Secretary.

CLERK'S CERTIFICATE.

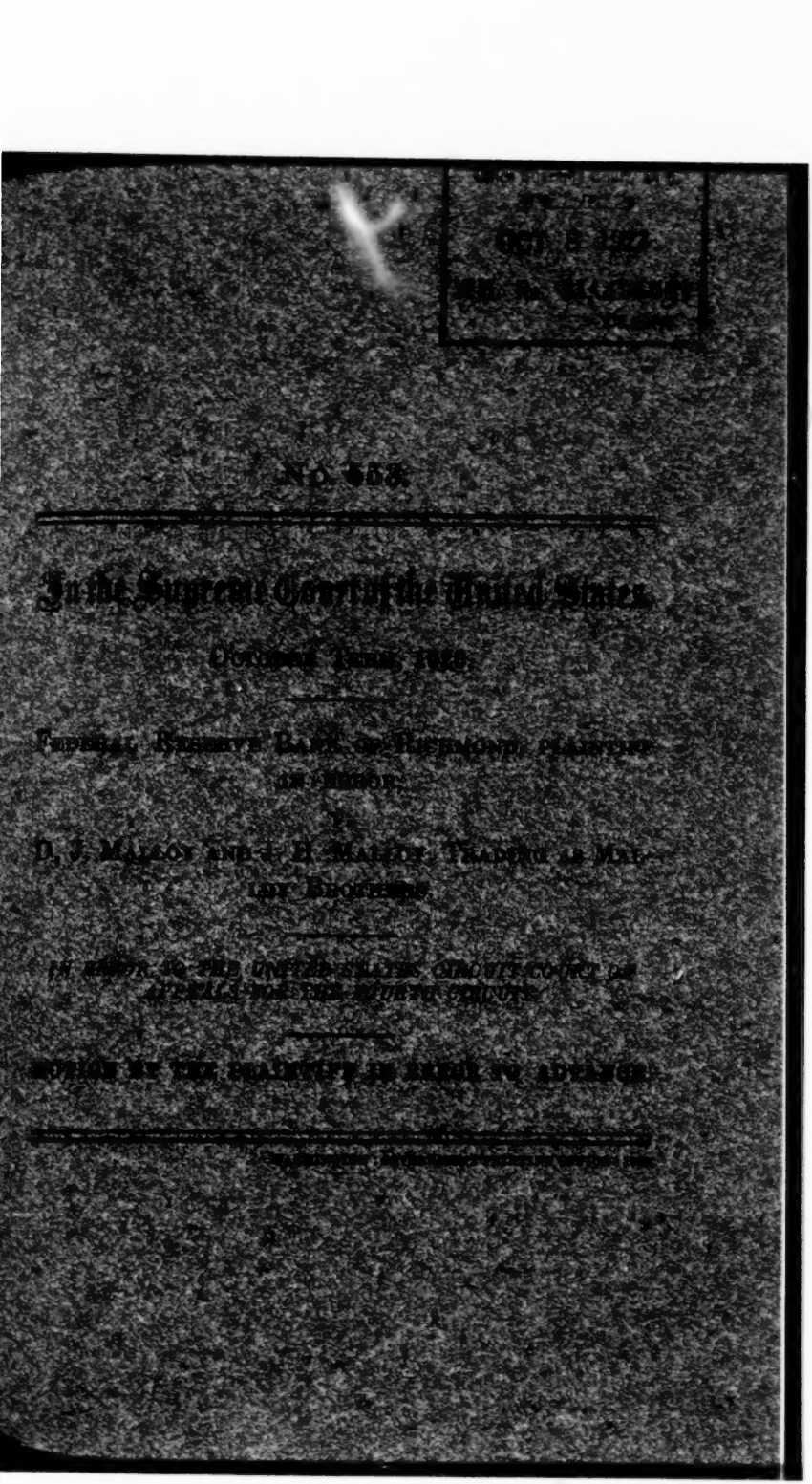
UNITED STATES OF AMERICA,
Fourth Circuit, ss:

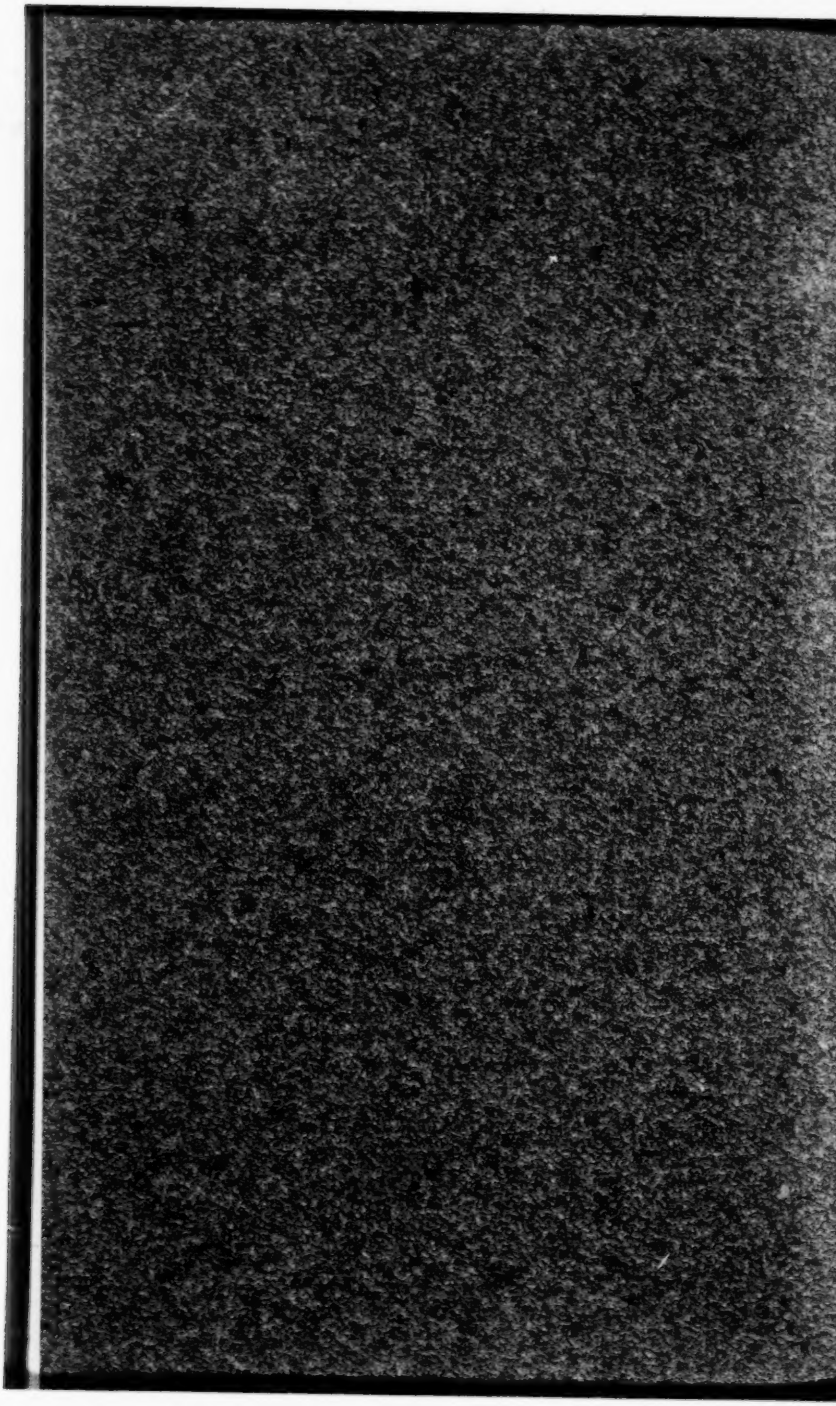
I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 13th day of September, A. D., 1923.

CLAUDE M. DEAN,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit.

(Seal of Court)





In the Supreme Court of the United States

OCTOBER TERM, 1923.

FEDERAL RESERVE BANK OF RICHMOND, plaintiff in error,
v.
D. J. MALLOY AND J. H. MALLOY, TRADING as Malloy Brothers.
No. 553.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION BY THE PLAINTIFF IN ERROR TO ADVANCE.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Federal Reserve Bank of Richmond respectfully shows as follows:

1. This case is pending in this court on a writ of error to review a judgment of the United States Circuit Court of Appeals for the Fourth Circuit affirming a judgment of the District Court of the United States for the Eastern District of North Carolina.

2. A statement of the facts in the case can be found in the opinion of the District Judge (printed transcript of the record, page 15). So far as perti-

nent to the purpose of this petition, the essential facts may be stated as follows:

The Federal Reserve Bank of Richmond received for collection from the Citizens & Southern Bank of Atlanta, Georgia, a check for $9,000.00, drawn upon the Bank of Lumber Bridge, North Carolina, a nonmember State bank. This check was drawn by Napier H. G. Balfour to the order of Malloy Bros. and indorsed by Malloy Bros., Perry Banking Company, Atlantic National Bank of Jacksonville, Florida; and the Citizens & Southern Bank of Atlanta, Georgia. The Federal Reserve Bank of Richmond sent the check to the Bank of Lumber Bridge for remittance in ordinary course. The Bank of Lumber Bridge canceled the check, charged it to the account of Balfour, and sent to the Federal Reserve Bank of Richmond a bank draft payable in Greensboro, North Carolina. The Federal Reserve Bank of Richmond sent this exchange draft to Greensboro for payment, but it was dishonored; and before the Federal Reserve Bank of Richmond could collect the amount from the Bank of Lumber Bridge that bank was placed in the hands of a receiver.

3. The Citizens & Southern Bank of Atlanta was a member of the Federal Reserve System, and the Federal Reserve Board had promulgated a certain regulation reading in part as follows:

> In handling items for member and nonmember clearing banks, a Federal Reserve Bank will act as agent only. The Board will require that each member and nonmember clearing

> bank authorize its Federal Reserve Bank to send checks for collections to banks on which checks are drawn, and except for negligence, such Federal Reserve Banks will assume no liability.

Malloy Bros. contended that the Federal Reserve Bank of Richmond was their agent and that the check was an unconditional order for money and that the Federal Reserve Bank of Richmond was negligent in accepting from the Bank of Lumber Bridge any medium of payment except lawful money. This contention the courts below sustained.

4. In the case of *American Bank & Trust Company* v. *Federal Reserve Bank of Atlanta* (opinion delivered June 11, 1923), this court held that a Federal reserve bank was authorized to receive checks for collection on nonmember state banks and to present them through the mails or otherwise for payment in money or by a bank draft. The contention was made in that case that an unconditional demand for money and a refusal to accept settlement in exchange draft would amount to coercion. The court did not decide this point, as the Federal Reserve Bank of Atlanta had alleged that it intended to accept exchange drafts. In the instant case, the courts below held that a Federal reserve bank must insist on payment in currency and should not accept settlement by means of exchange drafts.

Since the Federal reserve banks are now collecting checks upon the majority of the nonmember banks of this country, we assert that it is of the greatest

importance to the Federal reserve banks and the persons whose checks are collected through them to know whether or not a Federal reserve bank may accept exchange drafts or must, at its peril, demand payment in money in settlement for all checks drawn upon nonmember State banks.

Wherefore, your petitioner respectfully prays that this Honorable Court will grant the motion to advance this case on the calendar of this Honorable Court.

We are authorized by counsel representing the defendants in error to say that he has no objection to this case being advanced upon the docket.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

M. G. WALLACE,
Solicitor and Counsel for the Plaintiff in Error.

OCTOBER, 1923.

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WM. R. STA

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 553.

FEDERAL RESERVE BANK OF RICHMOND, PLAINTIFF IN ERROR,

versus

D. J. MALLOY & J. H. MALLOY, TRADING AS MALLOY BROTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

M. G. WALLACE,
Counsel for Plaintiff in Error.

RICHMOND PRESS, INC., PRINTERS

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Supreme Court of the United States

FEDERAL RESERVE BANK OF RICHMOND, PLAINTIFF IN ERROR,

versus

D. J. MALLOY & J. H. MALLOY, PARTNERS, TRADING AS MALLOY BROTHERS, DEFENDANTS IN ERROR.

BRIEF FOR FEDERAL RESERVE BANK OF RICHMOND, PLAINTIFF IN ERROR.

HISTORY OF PROCEEDINGS.

This is a civil action originally instituted in the Superior Court for Cumberland County, North Carolina, by Malloy Brothers, defendants in error, against the Federal Reserve Bank of Richmond, plaintiff in error, and N. H. G. Balfour, to recover the sum of nine thousand dollars ($9,000.00), that being the amount of a check drawn by Balfour to the order of Malloy Brothers, upon the Bank of Lumber Bridge, which the Federal Reserve Bank had received for collection and sent to the drawee bank for remittance, and for which the drawee bank had sent in settlement a worthless draft. The plaintiff in error was organized under the laws of the United States,

and in due time it filed a petition praying that the case be removed to the District Court of the United States for the Eastern District of North Carolina, upon the ground of the Federal incorporation of the defendant. This was accordingly done. The Federal Reserve Bank of Richmond and N. H. G. Balfour both filed answers in the Federal court, denying liability, and the case came on for trial.

By stipulation in writing (Transcript, page 14) a trial by jury was waived. There was no substantial conflict in the evidence, and the plaintiffs and both defendants moved the trial court to give judgment as a matter of law on the uncontradicted evidence. The court filed a written statement of facts and opinion, and gave judgment in favor of Balfour, but against the Federal Reserve Bank of Richmond. No exception was taken to so much of the judgment as discharged Balfour, but the Federal Reserve Bank of Richmond filed bills of exception embodying the entire testimony and made three assignments of error, which, in substance, presented only one contention, i. e., that upon the facts of the case, as shown by the uncontradicted evidence and as stated by the court, the plaintiffs were not entitled to judgment. The judgment of the trial court was reviewed on writ of error by the Circuit Court of Appeals for the Fourth Judicial Circuit, which adopted in substance the opinion filed by the judge of the District Court, and affirmed the judgment. The Federal Reserve Bank of Richmond, plaintiff in error, thereupon filed in the Circuit Court of Appeals assignments of error, substantially the same as those relied upon in the District Court, and sued out a writ of error to this court.

STATEMENT OF FACTS.

The essential facts may be stated as follows:

Balfour was indebted to Malloy Brothers upon a note secured by a mortgage, and sent to them a check

payable to their order for the sum of nine thousand dollars ($9,000.00), drawn upon the Bank of Lumber Bridge, North Carolina. This check was received by Malloy Brothers at their office at Quitman, Georgia, and a memorandum of credit was endorsed on the note of Balfour, but the note and mortgage were not surrendered or cancelled. (Testimony of J. H. Malloy, Transcript, page 33.) Malloy Brothers endorsed the check and deposited it for collection with the Perry Banking Company, of Perry, Florida (Transcript, page 33). The check was endorsed in blank, but the agreement under which it was deposited appears in the record (Transcript, page 33). The Perry Banking Company endorsed the check and sent it to the Atlantic National Bank of Jacksonville. The record does not show the terms upon which the Atlantic National Bank accepted the check. The Citizens & Southern Bank received the check at its office in Atlanta, Georgia, from the Atlantic National Bank of Jacksonville, Florida, for collection for the credit of the Jacksonville bank. The terms and conditions upon which the check was received by the Citizens & Southern Bank are shown in the record (Testimony of J. A. Wallace, Transcript, page 41). The Citizens & Southern Bank was a member of the Federal Reserve System and did business in the Sixth, or Atlanta, District, and it had made an arrangement with the Federal Reserve Bank of Atlanta and Richmond whereby checks payable in North Carolina would be collected for the Citizens & Southern Bank and credited to its account with the Federal Reserve Bank of Atlanta. The arrangement between the member bank and the two Federal Reserve Banks will be stated at greater length hereafter. The Bank of Lumber Bridge, upon which the check was drawn, was not a member of the Federal Reserve System, but had agreed with the Federal Reserve Bank of Richmond to remit at par for checks sent to it through the mails. The agreement was that remittance might be either by shipment of currency at the expense of the Federal Reserve Bank of

Richmond, or by draft drawn by the Bank of Lumber Bridge upon some reserve correspondent. (Transcript, pp. 59 and 60.)

The check was received by the Federal Reserve Bank of Richmond on December 10, 1920, and was on that date sent to the Bank of Lumber Bridge for remittance, in pursuance of the above stated agreement (Transcript, page 52). The Bank of Lumber Bridge cancelled the Balfour check, charged it to the account of Balfour, and sent to the Federal Reserve Bank of Richmond, in settlement for this and other checks, a draft drawn by the Bank of Lumber Bridge on its reserve correspondent, the Atlantic Banking & Trust Company of Greensboro, North Carolina. This remittance draft was received by the Federal Reserve Bank of Richmond on December 15th, and on that day sent to Greensboro for payment. On December 17th, the Atlantic Banking & Trust Company wired that the draft was not good and would not be paid (Transcript, page 53). The Federal Reserve Bank of Richmond called on the Bank of Lumber Bridge to make the draft good and sent a special representative to Lumber Bridge to attempt to collect the amount, but the Bank of Lumber Bridge did not have and could not obtain a sufficient sum in cash to pay the amount due (Testimony of D. M. Hale, Transcript, page 60). On December 24th, the Bank of Lumber Bridge was closed by the order of the State Bank Examiner.

The Federal Reserve Bank of Richmond had notified the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank that the remittance draft issued by the Bank of Lumber Bridge had been dishonored (Transcript, page 55), and, accordingly, the Federal Reserve Bank of Richmond refused to give final credit for the amount of the Balfour check.

The defendants in error, plaintiffs below, in substance alleged in their complaint (Transcript, pages 2 and 4):

1. That the Federal Reserve Bank of Richmond was their agent.

2. That it had negligently failed to collect the check drawn by Balfour in that:

(a) It had sent the check to the bank upon which it was drawn;

(b) It had accepted an exchange draft in settlement, instead of insisting upon payment in cash; and

(c) It had failed to promptly and correctly notify Malloy Brothers of the situation which arose after the exchange draft was dishonored.

The Citizens & Southern Bank was a member of the Federal Reserve System and did business in the district of the Federal Reserve Bank of Atlanta. It could not have an account with the Federal Reserve Bank of Richmond, but the regulations of the Federal Reserve Board (See Federal Reserve Regulation J, paragraph 2, Transcript, page 37) provided that checks might be sent by a member bank in one district to a Federal Reserve Bank in another district, to be collected for the account of the Federal Reserve Bank in the member bank's own district, just as if the checks had been sent by the member bank to its own Federal Reserve Bank, and by that bank sent to the Federal Reserve Bank in the district in which the checks were payable. This arrangement could be made only with the approval of the Federal Reserve Bank in the district in which the member bank was situated (Testimony of J. A. Wallace, Transcript, page 44; Testimony of M. W. Bell, Transcript, page 49). In pursuance of this regulation, the Federal Reserve Bank of Atlanta had authorized the Citizens & Southern Bank to send checks directly to the Federal Reserve Bank of Richmond for the credit of the Federal Reserve Bank of

Atlanta, but such checks were handled just as if sent to the Federal Reserve Bank of Richmond by the Federal Reserve Bank of Atlanta, the Richmond bank acting merely as a deputy or agent of the Atlanta bank.

Regulation J also prescribed the terms and conditions upon which checks could be received by Federal Reserve Banks for collection. This regulation is printed at length in the record (Transcript, page 39). The Federal Reserve Bank of Atlanta had, by a circular letter, notified the Citizens & Southern Bank that it could receive checks for collection only upon certain terms and conditions. The circular letter of the Federal Reserve Bank of Atlanta set out the substance of the regulation, and the Citizens & Southern Bank had agreed to be bound by the terms set forth in the circular (Transcript, page 47). The pertinent part of Regulation J is as follows:

> "In handling items for member and non-member clearing banks, a Federal Reserve Bank will act as agent only. The Board will require that each member and non-member clearing bank authorize its Federal Reserve Bank to send checks for collection to banks on which checks are drawn, and except for negligence, such Federal Reserve Banks will assume no liability. Any further requirements that the Board may deem necessary will be set forth by the Federal Reserve Banks in their letters of instruction to their member and non-member clearing banks. Each Federal Reserve Bank will also promulgate rules and regulations governing the details of its operations as a clearing house, such rules and regulations to be binding upon all member and non-member banks which are clearing through the Federal Reserve Bank."

The Federal Reserve Bank of Richmond, therefore, contended:

1. That it had received the check from the Citizens & Southern Bank for the credit of the Federal Reserve

Bank of Atlanta and that there was no privity of contract between itself and Malloy Brothers, so that it was not their agent but was acting solely for the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank of Atlanta.

2. That even if the Federal Reserve Bank of Atlanta was regarded as the agent of Malloy Brothers, it had fully discharged its duties, because:

(a) The Citizens & Southern Bank had expressly agreed that the check might be sent for collection directly to the bank on which it was drawn;

(b) Bank drafts were the usual method of remittance, so that authority to send the check for collection directly to the bank on which it was drawn implied authority to accept a remittance draft; and the acceptance of the draft did not increase the risk necessarily incident to sending a check for collection directly to the bank on which it was drawn.

(c) The Federal Reserve Bank of Richmond had handled the check promptly and correctly and had promptly and correctly notified the Citizens & Southern Bank of the situation as soon as it was apparent that the Bank of Lumber Bridge could not make its remittance draft good and that an earlier notice would have been of no avail.

The court, in its opinion, set out the facts above stated and held that the surrender and cancellation of the check released Balfour; and upon the subject of the liability of the Federal Reserve Bank of Richmond held:

1. That the Citizens & Southern Bank was an agent of Malloy Brothers, so that they were privy to the contract between the Citizens & Southern Bank and the Federal Reserve Banks.

2. That the regulation of the Federal Reserve Board entered into the contract between the member bank and the Federal Reserve Banks and contained the exclusive statement of the liability of the Federal Reserve Bank.

3. That the Federal Reserve Bank of Richmond had promptly and diligently handled the check and the remittance draft and had, therefore, strictly speaking, committed no negligence.

4. But that the Balfour check was an order for money and the Federal Reserve Bank was not authorized to waive the requirement of common law that checks should be paid in lawful money and that, therefore, the Federal Reserve Bank was liable for accepting an exchange draft upon the Bank of Lumber Bridge.

The three assignments of error made by the Federal Reserve Bank presented in substance the following points:

1. That upon the uncontradicted evidence judgment should have been given in its favor.

2. That the court erred in the effect it gave to certain testimony concerning the use of bank drafts by banks.

3. That the facts, as found and stated by the court, showed that judgment should have been in favor of the Federal Reserve Bank of Richmond.

However, as we have stated above, these three assignments present only one proposition, i. e., that as a matter of law upon the uncontradicted evidence the plaintiff below was not entitled to recover.

ARGUMENT ON FIRST ASSIGNMENT OF ERROR.

The first assignment of error in this court is substantially the same as the first assignment of error in the Circuit Court of Appeals (Transcript, pages 72 and 85), it is:

> "The Circuit Court of Appeals erred in affirming the judgment entered by the District Court of the United States for the Eastern District of North Carolina, and in not reversing said judgment, for that it appeared from the uncontradicted evidence in the said case that the Federal Reserve Bank of Richmond, plaintiff in error, was in no way liable to the defendant in error, and the said District Court was moved to so find and rule, but the said District Court refused to so find and rule, and gave judgment against the plaintiff in error."

In the discussion of this assignment of error two questions of law arise:

1. Can Malloy Brothers maintain an action against the Federal Reserve Bank of Richmond upon the theory that it was their agent?

2. If the Federal Reserve Bank of Richmond be regarded as agent of Malloy Brothers, has it been in any way negligent?

THERE WAS NO PRIVITY OF CONTRACT BETWEEN THE PARTIES.

Malloy Brothers and the Federal Reserve Bank of Richmond Were Strangers in Fact.

Malloy Brothers, in their complaint, allege that the Federal Reserve Bank of Richmond was their agent; but agency is a contractual relation which arises only by

mercial law, it is one upon which the Federal courts do not, of necessity, follow the state decisions.

There Could Have Been no Contractual Relation Between Malloy Brothers and the Federal Reserve Bank of Richmond.

Federal Reserve Banks can receive checks on deposit or for collection only for the account of member banks, non-member banks which have opened clearing accounts, other Federal Reserve Banks, and the United States and certain other public agencies, such as the War Finance Corporation. Therefore, the Federal Reserve Bank of Richmond could not have made an agreement binding it to act as the agent of Malloy Brothers and to be accountable to them, as such an agreement would have been *ultra vires* and void, and no action would lie upon it. We, therefore, respectfully submit that the Federal Reserve Bank of Richmond could not in law, and did not in fact, contract with Malloy Brothers. Hence, no action can be maintained against it by them. The Federal Reserve Bank of Richmond is answerable for its actions to the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank with which it contracted, and to no other person. Malloy Brothers may maintain an action against the Perry Banking Company, which is their agent, and against no other person.

THE FEDERAL RESERVE BANK OF RICHMOND ACCEPTED THE CHECK FOR COLLECTION UPON CONDITION THAT IT WOULD BE SENT TO THE DRAWEE FOR REMITTANCE IN THE USUAL WAY.

If the court be of the opinion that Malloy Brothers can maintain this action at all, we think that it is undeniable that they can do so only upon the theory adopted by the trial court, i. e., that the Citizens & Southern Bank

is their agent and they were, therefore, privy to the contract made between the Citizens & Southern Bank and the Federal Reserve Bank of Atlanta, to which contract the Federal Reserve Bank of Richmond was likewise privy. But since the Citizens & Southern Bank was the holder of a check endorsed in blank, and Malloy Brothers' real interest, if it existed, was unknown, if they sue upon the contract made by the Citizens & Southern Bank they ratify it in all things and stand exactly in the shoes of their agent.

This contract was made in Georgia and was between two Federal Reserve Banks and a member bank. If a Federal law or regulation was applicable, it would control. If no Federal law was applicable, the contract must be regarded as one made in Georgia to be performed in North Carolina.

The learned judge below held, and, we think, correctly, that Regulation J established a complete rule for determining the rights of the parties, for he says, "This regulation, to the extent of its permissive provisions, must be taken to have been known to the Citizens & Southern Bank of Atlanta and the Federal Reserve Bank of Atlanta." (Transcript, page 47.)

The regulations of the Federal Reserve Board were intended to govern the operation of Federal Reserve Banks in establishing a method for the collection of checks in every state in the Union. In order to properly understand them, we must take into consideration the methods and practices in common use among bankers and the law relating to the duties and obligations of a collecting bank.

If a bank in one town receives on deposit or for collection a check payable in another town, there are three possible ways by which it may be collected:

1. The collecting bank may dispatch a special messenger to the place where the check is payable and for-

agreement between the parties. Malloy Brothers did not know that the check had been deposited in the Federal Reserve Bank of Richmond, for J. H. Malloy testified (Transcript, page 33): "I do not know of my own knowledge what happened to the check after it was deposited by us with the Perry Banking Company." The check was endorsed in blank (Transcript, page 33). Although the Perry Banking Company seems to have received the check as an agent for Malloy Brothers, to the world it appeared to be the holder. The record does not disclose the relation of the Atlantic National Bank of Jacksonville to the Perry Banking Company. The Atlantic National Bank may have been an agent for the Perry Banking Company, but for aught that appears in the record the check may have been transferred to the Atlantic National Bank for value and that bank may have become the holder in due course. The Citizens & Southern Bank received it for the credit of the Atlantic National Bank upon the terms set forth in the record (Transcript, page 41), but appears to have known of the interest of no party other than the Atlantic National Bank. The Federal Reserve Bank of Richmond received the check from the Citizens & Southern Bank for the account of the Federal Reserve Bank of Atlanta upon the terms and conditions which we have stated. It knew only the Citizens & Southern Bank and the Federal Reserve Bank of Atlanta, and had no notice of the interest of any other person whatsoever in the check (Testimony of L. A. Wingo, Transcript, page 55).

In such cases it seems to be established in the lower Federal courts that each bank is liable to its predecessor and only to its predecessor. In *Taylor-Bournique* vs. *National Bank of Ashtabula*, 262 Federal 168, at page 172 the court says:

> "I am of the opinion that plaintiff may maintain an action only against the bank with which it made a contract for collection and not against any

other bank to which the receiving bank may forward it."

Balcomb vs. *Old National Bank*, 201 Federal 679, seems to be to the same effect, and the same rule had been recently applied by an inferior Federal court in the case of *First National Bank of Denver* vs. *Federal Reserve Bank of Kansas City*, 283 Federal 700. In this case, at page 701, the court says (italics ours):

> "The Hallack & Howard Lumber Company and the defendant, the Federal Reserve Bank of Kansas City (Denver Branch), which was selected by the plaintiff as a sub-agent to make the collection, are entire strangers, and the former, according to the *rule of the Federal courts* and the courts of Colorado, *has no right of action against the defendant*. See *Hoover* vs. *Wise*, 91 U. S. 308, 23 L. Ed. 392; *Exchange National Bank* vs. *Third National Bank*, 112 U. S. 276, 41 Sup. Ct. 499, 28 L. Ed. 722; *Taylor-Bournique* vs. *National Bank of Ashtabula*, 262 Fed. 168; *First National Bank of Denver* vs. *Manhattan Life Insurance Co.*, 21 Colo. App. 256, 120 Pac. 1112; and *Manhattan Life Ins. Co.* vs. *First National Bank of Denver*, 20 Colorado App. 529, 80 Pac. 467."

While this court does not appear to have decided the particular point, the Federal decisions quoted above appear to follow in logical sequence the decisions of this court in *Hoover* vs. *Wise*, 91 U. S. 308, 23 L. Ed. 392, and *Exchange National Bank* vs. *Third National Bank*, 112 U. S. 276, 41 Sup. Ct. 499, 28 L. Ed. 722.

We concede that the state courts are not unanimous upon this precise point. There are, however, many states which have followed the rule adopted by the lower Federal courts, as, for example, in the following cases: *Cohen* vs. *Tradesmen National Bank*, 262 Pa. 76, 105 Atlantic 43; *Montgomery County Bank* vs. *Albany City Bank*, 7 New York 459.

Since the rule is one which involves general com-

mercial law, it is one upon which the Federal courts do not, of necessity, follow the state decisions.

There Could Have Been no Contractual Relation Between Malloy Brothers and the Federal Reserve Bank of Richmond.

Federal Reserve Banks can receive checks on deposit or for collection only for the account of member banks, non-member banks which have opened clearing accounts, other Federal Reserve Banks, and the United States and certain other public agencies, such as the War Finance Corporation. Therefore, the Federal Reserve Bank of Richmond could not have made an agreement binding it to act as the agent of Malloy Brothers and to be accountable to them, as such an agreement would have been *ultra vires* and void, and no action would lie upon it. We, therefore, respectfully submit that the Federal Reserve Bank of Richmond could not in law, and did not in fact, contract with Malloy Brothers. Hence, no action can be maintained against it by them. The Federal Reserve Bank of Richmond is answerable for its actions to the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank with which it contracted, and to no other person. Malloy Brothers may maintain an action against the Perry Banking Company, which is their agent, and against no other person.

THE FEDERAL RESERVE BANK OF RICHMOND ACCEPTED THE CHECK FOR COLLECTION UPON CONDITION THAT IT WOULD BE SENT TO THE DRAWEE FOR REMITTANCE IN THE USUAL WAY.

If the court be of the opinion that Malloy Brothers can maintain this action at all, we think that it is undeniable that they can do so only upon the theory adopted by the trial court, i. e., that the Citizens & Southern Bank

is their agent and they were, therefore, privy to the contract made between the Citizens & Southern Bank and the Federal Reserve Bank of Atlanta, to which contract the Federal Reserve Bank of Richmond was likewise privy. But since the Citizens & Southern Bank was the holder of a check endorsed in blank, and Malloy Brothers' real interest, if it existed, was unknown, if they sue upon the contract made by the Citizens & Southern Bank they ratify it in all things and stand exactly in the shoes of their agent.

This contract was made in Georgia and was between two Federal Reserve Banks and a member bank. If a Federal law or regulation was applicable, it would control. If no Federal law was applicable, the contract must be regarded as one made in Georgia to be performed in North Carolina.

The learned judge below held, and, we think, correctly, that Regulation J established a complete rule for determining the rights of the parties, for he says, "This regulation, to the extent of its permissive provisions, must be taken to have been known to the Citizens & Southern Bank of Atlanta and the Federal Reserve Bank of Atlanta." (Transcript, page 47.)

The regulations of the Federal Reserve Board were intended to govern the operation of Federal Reserve Banks in establishing a method for the collection of checks in every state in the Union. In order to properly understand them, we must take into consideration the methods and practices in common use among bankers and the law relating to the duties and obligations of a collecting bank.

If a bank in one town receives on deposit or for collection a check payable in another town, there are three possible ways by which it may be collected:

1. The collecting bank may dispatch a special messenger to the place where the check is payable and for-

mally present the check and receive payment of the amount in cash, and bring the cash back to the collecting bank.

2. The check may be sent to some suitable agency at the place of payment, and this sub-agent may collect it and make settlement for the amount.

3. The collecting bank may send the check directly to the bank on which it is drawn under some arrangement whereby this bank will make remittance for the check, if it be good.

The first method is obviously too expensive and cumbersome for ordinary use, as this court recognized in *Farmers and Merchants Bank* vs. *Federal Reserve Bank of Richmond*, decided June 11th, 1923, 43 S. Ct. Rep. 641. It is a matter of common knowledge that it is not used in practice.

The second and third methods are in general use among the banks of this country, the choice between them depending upon the circumstances of each case. The third is perhaps the simplest and most expeditious; and when, as in this case, the drawee is the only bank in its town, the third is the one practical method.

There is an irreconcilable conflict in the decisions of the various state courts upon the question of the nature of the responsibility which should be inferred or implied from the mere act of accepting a check for collection when there is no express contract setting forth the liability of the collecting bank. Many courts, headed by this court, have held that, if there was no contract or agreement showing a different intention, it is fair to infer that the bank in which the check is first deposited undertakes the collection of it as an independent contractor, and that the general contractor is liable for all defaults of all sub-contractors. This view is commonly called the New York rule.

Other courts hold that the depositor should know that the bank in which he deposits a check does not undertake to do business in a distant city, and that, therefore, in the absence of express agreement, it is fair to infer that the depositor intends to authorize his bank to select a suitable sub-agent on his behalf, and that the collecting bank undertakes only to exercise prudence and care in selecting suitable sub-agents, and to forward the check to this sub-agent for collection. This is called the Massachusetts rule.

A full discussion of these divergent views will be found in *Exchange National Bank* vs. *Third National Bank*, 112 U. S. 276, and *Bank* vs. *Triplet*, 1 Pet. 25, and also in 3 Ruling Case Law, page 623, title "Banks," Sections 251-2.

In those jurisdictions in which the courts adhere to the so-called Massachusetts rule, there is some diversity of opinion as to whether or not the drawee is a proper sub-agent. The majority of courts hold that it is never proper to select the drawee as a sub-agent, for the drawee always has an interest adverse to the holder of the check. See *Bank of Rocky Mount* vs. *Floyd*, 142 N. C. 187, and 3 Ruling Case Law, page 627, title "Banks," Section 255-6-7. Some courts, however, recognize that under modern conditions the risks incident to the method of collecting a check by sending it to the drawee for remittance were no greater than those incident to the employment of some independent agent in the same place. See *Hilsinger* vs. *Trickett*, 86 Ohio State 286, 99 N. E. 305; *Kershaw* vs. *Ladd*, 56 Pac. 402, 34 Ore. 375; *Wilson* vs. *Carlinville National Bank*, 187 Ill. 22, 58 N. E. 250, 52 L. R. A. 632.

All courts seem to be agreed that if there was an express contract defining the relationship and liability of the bank to its depositor, the terms of this contract would control.

The pertinent portion of Regulation J is as follows (italics ours):

> "In handling items for member and non-member clearing banks, a Federal Reserve Bank will act *as agent only.* The Board will require that each member and non-member clearing bank authorize its Federal Reserve Bank *to send checks for collection to banks on which checks are drawn,* and *except for negligence,* Federal Reserve Banks will assume no liability."

If we study the above quotation in the light of the banking practices outlined above and the conflict in judicial opinion, its meaning is obvious. The Federal Reserve Banks operate in all states. It was very desirable to have a uniform rule of liability and a uniform method of operation. The Board, therefore, promulgated a regulation which would form a *quasi* contract between the Federal Reserve Banks and their depositors, the member banks and other Federal Reserve Banks. This regulation established:

1. That the Federal Reserve Bank should be a forwarding agent only and not an independent contractor; that is to say, it should not assume responsibility for the defaults of the sub-agents to which it might send the checks.

2. That they might employ the drawee as sub-agent and send the check to the drawee for collection and remittance, and might after that, in collecting from the drawee, follow the usual method common among prudent bankers.

Authority to Send Checks Directly to the Drawee, Implies Authority to Accept Exchange Draft From Drawee.

The learned judge of the district court held that the Federal Reserve Bank of Richmond was a forwarding agent only, and could send the check directly to the drawee, but, notwithstanding this, held that the Federal

Reserve Bank must insist that settlement be made in actual money and must, at its peril, keep itself in a position to prevent the drawee from cancelling the check until cash was actually in the hands of the Federal Reserve Bank. We contend that such interpretation and application of the regulation renders it practically of no effect, and fails to take into account the obvious intent of the Board which promulgated it.

The phrase "to send checks for collection to banks on which checks are drawn" obviously does not express a complete idea. A check cannot be collected merely by sending it for collection to the bank on which it is drawn. After the drawee bank has collected the check by charging it to the drawee and thus becoming the debtor of the holder, something further must be done. We contend that the phrase is, by necessary implication, completed as follows: "Send checks to the banks on which checks are drawn for collection *and remittance in the usual and ordinary manner.*" This meaning is made clearer by the additional expression, "and except for negligence, such Federal Reserve Banks will assume no liability," for negligence is in substance a departure from the course of conduct usually followed by prudent men!

It is a matter of common knowledge that banks usually settle between themselves by means of drafts. There was positive and uncontradicted evidence to this effect, for Edward Waller, Jr., an Assistant Cashier of the Federal Reserve Bank of Richmond, testified as follows (Transcript, page 66):

> "I am thirty-one years of age, and am Assistant Cashier of the Federal Reserve Bank of Richmond, having general supervision of the Transit, Bookkeeping and Adjustment & Transfer Departments. I held this position on December 24, 1920. . . .
>
> "I have been in the banking business since February, 1910. The business of check collecting is handled by the Federal Reserve Bank in a way very

similar to that in which it is handled by collecting banks throughout the country. When one bank receives checks on another in a distant city, it usually sends them to the bank upon which they are drawn or to some other bank in that city, and receives settlement by means of an exchange draft drawn by the bank to which the checks are sent upon some one of its correspondents. When checks are sent with the expectation that the bank receiving them will remit at once, we call it sending for collection and return. When this is done, the bank upon which the checks are drawn is expected to cancel the checks and charge them to the accounts of the drawers and to remit by means of its exchange draft or by a shipment of currency. An exchange draft is used more frequently than a shipment of currency."

The learned judge below appeared to consider that this testimony was irrelevant, because there was no evidence that Malloy Brothers knew of the custom of the banks; but this view is plainly unsound, for we think he overlooked the fact that this testimony was not offered to prove that the Federal Reserve Banks were authorized to send checks directly to the banks on which they were drawn. That authority was conferred by the regulations of the Federal Reserve Board, which had been accepted by, and were of their own force binding upon, the Citizens & Southern Bank, the agent of Malloy Brothers. The evidence of custom was introduced to show the intent and meaning of the regulations of the Federal Reserve Board as expressed in the regulations. This Board is charged with the duty of supervising banks and is conversant with their customs. The regulations were addressed to bankers, who, of necessity, know their own customs, and should, therefore, be considered and interpreted in the light of customs and usages generally followed in the banking business.

Regulation J provided that Federal Reserve Banks should send checks directly to the drawee without assuming liability, except for negligence. Negligence is

by definition the failure to use those means which men of ordinary prudence employ when their own interest is involved. If the Federal Reserve Bank followed a general custom used in like cases by prudent bankers, Malloy's ignorance could not enter into or affect the definition of negligence.

The custom to which we have alluded is so generally known that courts take judicial notice of it. In *Bank* vs. *Davis*, 114 N. C. 343, at page 345, the court said (italics ours):

> "Now it is a well known and established custom of banks when acting as collecting agents either for other banks or indeed for any customer, to put all collections made by them into the general fund of the bank, unless directed to make of them a special deposit, and use them from hour to hour and from day to day in the transaction of their current business, and, when the day or the hour arrives for making remittances, send to the bank or other customer for whom the collection was made, not the identical currency or money collected, but money or currency taken from the general fund without reference to its identity, or, as is *far oftener done, its cashier's check on itself or some other bank*, or in some way to effect settlement."

In *First National Bank of Richmond* vs. *Wilmington & Weldon Railway*, 70 Federal 401, a case decided by the Circuit Court of Appeals for the Fourth Circuit, the court said (italics ours):

> "The custom of banks does not require a collecting bank to keep money separate and apart from all others in its possession, and to remit that very money to the bank for which it made the collection; *and the courts will take judicial cognizance of this fact.* If this were not so, and if the payer and drawer of a draft were bound to look to the transmission of the very money paid upon it, an important branch of the business of banks would be discon-

tinued, and the sending of money by express would become necessary in all cases of collection, to the great inconvenience of bankers."

In *Farmers Bank & Trust Co.* vs. *Newland*, 31 S. W. 38, 97 Ky. 464, the court said:

"If this (acceptance of checks) cannot be done, then the only course left for a bank to pursue is to send an agent to the point where the collection is to be made, or to have the bank or agent at that point send by express or other means of transportation the proceeds of the collection in money. This is not regarded as safe, by the most prudent business men, as to transfer money through the medium of checks and drafts. It is cumbersome and would be a most unsatisfactory way to transact business."

In *American Bank & Trust Co.* vs. *Federal Reserve Bank of Atlanta*, opinion delivered June 11, 1923, 43 St. Ct. Rep. 649, this court alluded to the custom as a matter of general knowledge, saying (italics ours):

"A large part of the checks drawn on country banks are sent to payees who reside in place other than that in which the drawee bank is located. Payment of such a check is ordinarily secured through the payee's depositing it in his local bank for collection. This bank ordinarily used, as the means for presenting the check to the drawee, a clearing house and / or correspondent banks. Formerly when the check was so presented, the drawee ordinarily paid, *not in cash, but by a remittance drawn on his balance in some reserve city* or by a credit with some correspondent."

The court will doubtless recall that in the above mentioned case against the Atlanta bank, the state banks charged that a demand for payment in cash was so unusual as to show malice and amount to coercion. (*American Bank & Trust Co.* vs. *Federal Reserve Bank of Atlanta*, 256 U. S. 350.) The court did not find it necessary

to decide the point, since the answer of the Federal Reserve Bank of Atlanta and the evidence in the case showed no intent to insist upon cash when remittance drafts were tendered, but at least one inferior Federal court has said that the insistence upon settlements in cash only was coercive and oppressive. (*Brookings State Bank* vs. *Federal Reserve Bank of San Francisco*, 277 Fed. 430, 281 Fed. 222.)

It seems to us that in the present case the courts below have decided that the Federal Reserve Banks must insist upon settlement in cash and in cash only when collecting checks upon non-member banks, and the Federal Reserve Banks are thus placed in a position that if they demand cash they may with some color be charged with coercion and oppression, but if they accept anything but cash they are adjudged guilty of negligence.

The Acceptance of Exchange Draft Was Not Direct Cause of Loss.

We think that another reason why it was error for the court to hold that the Federal Reserve Bank of Richmond is liable to Malloy Brothers because of the acceptance of the exchange draft is that the acceptance of the exchange draft did not of itself occasion any loss to Malloy Brothers. If a check drawn upon a bank be sent to that bank for collection, it is obvious that the drawee bank can collect it only by charging it to the account of the drawer. When this is done the drawer is released, and the drawee bank, which is also the collecting agent, becomes a debtor to the holder. There can be no doubt of this proposition, for it has been decided by this court in *American National Bank* vs. *Miller*, 229 U. S. 517, in which case, at page 520, Justice Lamar said:

> "There are some disadvantages of sending a check for collection directly to the bank on which it is drawn, but when such bank performs the dual

> function of collecting and crediting the transaction is closed, and, in the absence of fraud or mutual mistake, is equivalent to payment in usual course."

The same conclusion was reached in the case of *Rocky Mount* vs. *Floyd*, 142 N. C. 187, in which the drawee bank charged a check to the drawer but sent no remittance, and the court nevertheless held that the drawer was released. This last mentioned case was decided by Judge Henry G. Connor, who decided the case at bar in the District Court of the United States for the Eastern District of North Carolina, and who was formerly a member of the Supreme Court of North Carolina. In the case at bar the learned judge, in passing upon the liability of Balfour, held that Balfour was released as soon as the check drawn by him was cancelled and charged to his account, for he says.

> "It is well settled by these, and other authorities, as well as upon principle, that when the Cashier of the Lumber Bridge Bank stamped the check 'Paid,' charged it to his account and delivered it to Balfour, who had to his credit, subject to his check, an amount more than sufficient to pay his check, that the check was paid and his liability as maker or drawer discharged."

No exception to this ruling was taken by any party and it seems clearly correct. It is, therefore, very obvious, under well established authority and under the decision of the court in this case, that the instant that the Cashier of the Bank of Lumber Bridge stamped Balfour's check "Paid," Balfour was released, and the Bank of Lumber Bridge became liable to the holder of the check. At this time no exchange draft had been sent or accepted. The learned judge below held that the Federal Reserve Bank was authorized to send the check directly to the Bank of Lumber Bridge. It was, therefore, clear that at the time of the cancellation of the check the Fed-

eral Reserve Bank of Richmond had not made itself liable, for it had done nothing except send the check to the Bank of Lumber Bridge, upon which it was drawn. Since that time nothing has happened which has altered the situation of the parties. Balfour was then released and the holder of the check had a right of action against the Bank of Lumber Bridge, which was a debtor to the holder. The Bank of Lumber Bridge is still a debtor to the holder. It is true that the Bank of Lumber Bridge has now been adjudged insolvent, but it was, in fact, insolvent at that time. The sending of the exchange draft was a mere effort on the part of the Bank of Lumber Bridge to pay a debt which it owed. The acceptance of the exchange draft was merely a step made by the Federal Reserve Bank in the direction of securing payment from the Bank of Lumber Bridge—a natural and proper step. If the Federal Reserve Bank had refused the exchange draft and demanded a shipment of currency, this refusal would not have revived the liability of Balfour; and the Bank of Lumber Bridge could not have made the shipment of currency, so that it follows that a refusal of the exchange draft by the Federal Reserve Bank of Richmond would have had no effect upon the present situation, except that the holder of the check would then have had a right of action against the Bank of Lumber Bridge upon an open account. It now has a right of action against the Bank of Lumber Bridge as the drawer of the dishonored draft. The situation of the holder in either case is exactly the same.

If we take the view apparently taken by the trial court and say that the Federal Reserve Bank of Richmond was authorized to send this check directly to the Bank of Lumber Bridge, but was bound to see to it that the Bank of Lumber Bridge did not cancel the check until the proceeds were actually in the hands of the Federal Reserve Bank of Richmond, it is obvious that the Federal Reserve Bank of Richmond must then find some way by

which it could surrender the check into the hands of the Bank of Lumber Bridge and yet retain control over the Bank of Lumber Bridge. We respectfully submit that no practical system of handling checks can be devised under which the Federal Reserve Bank of Richmond, located at Richmond, Virginia, can send a check to the drawee in a town several hundred miles away and still retain control over the actions of the drawee, and prevent the drawee from cancelling the check until remittance has been made. To send directly to the drawee means to rely upon the good faith and credit of the drawee or it means nothing.

If the Federal Reserve Bank of Richmond be held liable because the drawee defaults, it is held liable for a loss arising out of the business of collecting checks, which prudence could not foresee and diligence could not avert. Such a loss is obviously not one due to negligence. In fact, the trial court concedes that the term "negligence" could not with accuracy be applied to anything which the Federal Reserve Bank of Richmond had done, for it says (italics ours):

> "I am of the opinion that the defendant, Federal Reserve Bank of Richmond, was not authorized to accept in payment of the proceeds of the check from the Lumber Bridge Bank, its check or draft on the Greensboro Bank and that, in doing it, was negligent, *or probably to state the situation more clearly*, it exceeded its authority and is liable to plaintiffs for the amount of the Balfour check."

We respectfully submit that if acceptance of the exchange draft cannot be aptly termed negligence, the acceptance of it by the Federal Reserve Bank of Richmond could not render it liable to Balfour, for it had received the check for collection upon condition that it should be liable for nothing *except negligence*.

CERTAIN CASES CITED BY THE TRIAL COURT DISTINGUISHED.

The court below cites many cases supporting the rule of law which the court states as follows (italics ours):

> "The authorities appear to be practically uniform in holding that, *in the absence of any instruction or permission from the owner of the check*, or any custom brought to the notice of such owner to the contrary the bank had no authority to accept or receive in payment of the check entrusted to it for collection anything other than money."

The cases relied on by the courts deal with banks which were collecting instruments payable in the town where the bank does business. In such a case it is easy to present the instrument in a formal manner—that is to say, exhibit it to the drawee—and yet retain possession until the drawee has made payment. Such cases can have no application to the collection of a check at a distant point. These cases, if closely examined, do not condemn the mere acceptance of something other than money. They condemn as negligent the act of surrendering a negotiable instrument to the drawee before payment is made, and hold that a collecting agent never has the right to do this unless expressly authorized. We concede that these cases state the correct view but they are obviously inapplicable to the present case. The Federal Reserve Bank of Richmond could not present an instrument to the drawee in Lumber Bridge and yet retain control of it, unless it sent an agent to Lumber Bridge for that purpose. The Board, therefore, in order that Federal Reserve Banks might handle checks received for collection in the ordinary way, required every member bank to authorize the Federal Reserve Banks to send checks to the drawee for collection; i. e.,

surrender the check to the drawee. The holders, through their agent, the Citizens & Southern Bank, agreed that the check could be handled in accordance with the Regulations of the Board. The Federal Reserve Bank, therefore, had express authority to surrender the check before receiving payment, and the courts have all conceded that an agent may do this if his principal has authorized the act.

CONCLUSION OF ARGUMENT ON ASSIGNMENT NO. 1.

We respectfully submit that the courts below erred in this case, because:

1. It appeared that Malloy Brothers were strangers in fact and in law to the Federal Reserve Bank of Richmond, which had undertaken to act as agent for the Citizens & Southern Bank and the Federal Reserve Bank of Atlanta only, and, therefore, Malloy Brothers cannot maintain this action.

2. It appeared that the terms and conditions under which the Federal Reserve Bank of Richmond accepted this check as agent for collection were that it should have authority to send the check directly to the drawee and should not be liable except for negligence. It appeared from the uncontradicted testimony that the Federal Reserve Bank of Richmond sent the check to the drawee and was faithful and diligent in its efforts to secure remittance from the drawee, and that in accepting an exchange draft from the drawee, after sending the check to the drawee, the Federal Reserve Bank of Richmond was following the usual and ordinary course of business among bankers and a course which necessarily followed the act of sending the check to the drawee. The acceptance of the exchange draft was not of itself a ground of

liability, because the loss to Malloy Brothers was complete when Balfour was released. The release of Balfour was occasioned by the cancellation of his check, so that after the check of Balfour was cancelled the acceptance of the exchange draft in no way altered the relations of the parties.

ARGUMENT ON SECOND ASSIGNMENT OF ERROR.

The second assignment of error is as follows (Transcript, pp. 73 and 85):

> "The Circuit Court of Appeals erred in failing and refusing to set aside the judgment entered by the District Court of the United States for the Eastern District of North Carolina, for that the said District Court found as follows:
>
> 'There is no evidence of any custom existing either in Virginia or North Carolina, by which collecting banks are authorized to accept from their agents or sub-agents, or from the drawee banks in settlement of collections sent them, anything other than money in settlement of such collections. Plaintiff, J. H. Malloy, testified that he was engaged in the lumber business and knew "very little about the workings of a bank—did not instruct the Perry Banking Co.—just sent the check down there for credit during the course of business." '
>
> which finding made by the said District Court was wholly without evidence to support it and contrary to and in conflict with the facts as shown by the uncontradicted testimony of Edward Waller, Jr., M. W. Bell, J. E. Wallace, and others, from which testimony it appeared that there was a custom existing and generally known to all Federal reserve banks, commercial banks and others engaged in the business of collecting checks in Virginia, North Carolina, and elsewhere, whereby banks made settlement with each other for collections sent to them by means of exchange drafts drawn upon their correspondents."

It may be that this assignment of error presents only a misapprehension of the trial court of the effect and purpose of certain evidence and does not deal with a finding of the court on an ultimate fact.

If the above quoted passage of the opinion of the

court means that there was no evidence that banks commonly use exchange drafts as a medium of settlement between themselves, it is plain that the court disregarded the uncontradicted testimony of Edward Waller, Jr., quoted, *supra*, pages 17 & 18, and the cases cited in this brief, pages 19 & 20, show that the custom is a matter of common and general notice, of which the courts take judicial notice without evidence.

If the quotation in the opinion means that Malloy Brothers knew nothing of the custom, and the evidence is, therefore, irrelevant in a suit brought by them, it is inconsistent with the position taken by the court in holding that the Citizens & Southern Bank was the agent of Malloy Brothers. The knowledge of the agent is imputable to the principal, and the Citizens & Southern Bank must be held to knowledge of the ordinary custom of banks, and must have contemplated that checks sent for collection to a Federal Reserve Bank for the credit of another bank would be handled in the ordinary way.

If the statement means that, although banks usually accept drafts in settlement for out-of town collections, there is no evidence that they are usually authorized by their depositors to do so, then we think it is clear that the court has misapprehended the object of the testimony embodied in Bill of Exception No. 2. The testimony was not offered to show the relations which usually exist between a bank and its customer, but to show the general practice of banks when collecting checks; for the regulations of the Federal Reserve Board, prepared by bankers for bankers, must be read in the light of existing conditions and established practices.

We have in our argument under Assignment No. 1 endeavored to point out the true application of this testimony and we will not here repeat it.

ARGUMENT ON THIRD ASSIGNMENT OF ERRO

Assignment of error No. 3 is as follows (Transcrip pp. 73 and 85):

> "The Circuit Court of Appeals erred in affirm ing the judgment entered in this cause by the Di trict Court of the United States for the Easter District of North Carolina, and in not reversin said judgment, for that it appeared from the fact as found and stated by the District Court of th United States for the Eastern District of Nort Carolina, that the Federal Reserve Bank of Rich mond was in no way liable to the defendant in erro yet, nevertheless, the said District Court of th United States for the Eastern District entered judg ment in favor of the defendant in error and again the plaintiff in error."

This assignment presents the contention that, the statement of facts made by the trial judge, jud ment should have been given for the Federal Reser Bank of Richmond. Since we concede that the stat ment of facts made by the trial judge, which was adopte and approved by the Circuit Court of Appeals, correct sets forth the material facts in the case, except in so f as there may be some ambiguity in the portion of t statement dealing with the testimony establishing t general custom of banks, which is discussed under A signment of Error No. 2, it is obvious that all we ha said with respect to the first assignment of error appli to the third. The two assignments present but one prop sition, i. e., upon the undisputed facts the plaintiff b low, defendant in error here, was not entitled to recov a judgment against the Federal Reserve Bank of Ric mond.

Respectfully submitted this 20th day of Novembe 1923.

M. G. WALLACE,
Counsel for Federal Reserve Bank
of Richmond, plaintiff in error.

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DEC 20
WM. R. ST

BRIEF FOR DEFENDANTS IN ERROR.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 553.

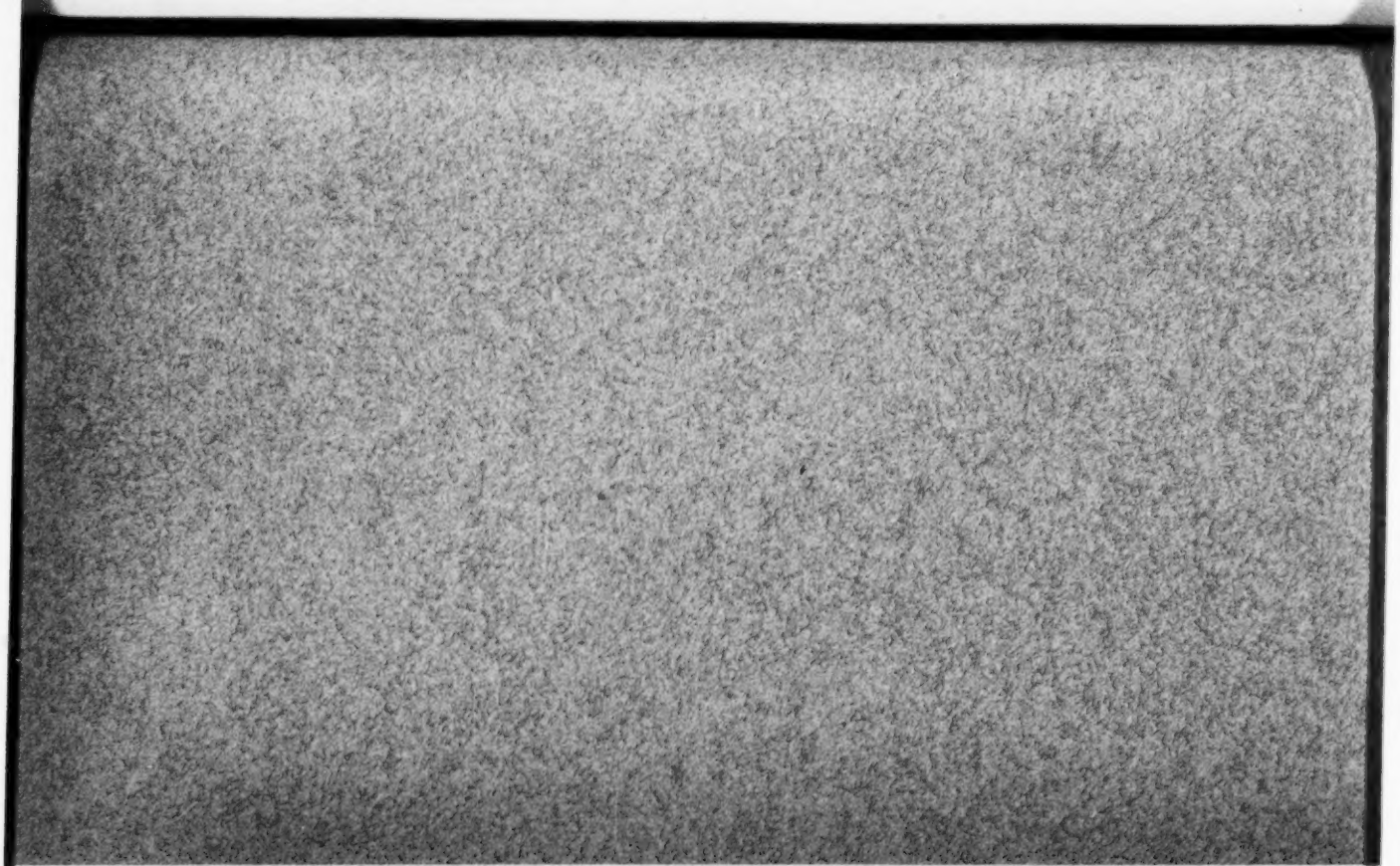
FEDERAL RESERVE BANK OF RICHMOND,
PLAINTIFF IN ERROR,

versus

D. J. MALLOY & J. H. MALLOY, TRADING AS MALLOY BROTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(29,863.)



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(29,863.)

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 553.

FEDERAL RESERVE BANK OF RICHMOND,
PLAINTIFF IN ERROR,

versus

D. J. MALLOY & J. H. MALLOY, TRADING AS MALLOY BROTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

STATEMENT OF FACTS.

This writ of error is presented by the Federal Reserve Bank of Richmond to review a judgment of the Circuit Court of Appeals for the Fourth Judicial Cir-

cuit, affirming *in toto* the findings of fact, opinion and judgment of the District Court of the United States for the Eastern District of North Carolina, to which the action was removed by petition from the Superior Court of Cumberland County, North Carolina, wherein D. J. Malloy and J. H. Malloy, partners, trading as Malloy Brothers, of Quitman, Georgia, defendants in error, were plaintiffs, and Federal Reserve Bank of Richmond, plaintiff in error, and Napier H. G. Balfour were defendants. A jury trial was waived, and his Honor H. G. Connor, District Judge, found the facts (Record, p. 14). It was adjudged that Malloy Brothers recover of the Federal Reserve Bank of Richmond nine thousand dollars, interest and costs (Record, pp. 29 and 81), because of a $9,000 check on the Bank of Lumber Bridge, Lumber Bridge, North Carolina, of November 30th, 1920, drawn by Balfour and mailed to Malloy Brothers as a partial payment on his $15,000 purchase money mortgage for a farm in Robeson County, North Carolina, which check they received, endorsed and mailed December 2nd, for collection, to the Perry Banking Company, Perry, Florida, their banking town (pp. 32-34). This bank issued to Malloy Brothers a credit slip therefor which provided: "Checks, drafts, etc., received for collection or deposit are taken at the risk of the endorser until actual final payment is received" (p. 33). This check, passing through the Atlantic National Bank, Jacksonville, Florida, and Citizens and Southern Bank, Atlanta, Georgia, reached the Federal Reserve Bank of Richmond for collection, and it sent it on December 10th direct to the bank on which it was drawn, the Bank of Lumber Bridge, which marked the check "paid," charged it to Balfour's account, which had more than $9,000 to his credit, and on December 14th, 1920, sent in payment of this and some other items its own worthless draft for $9,204.90 on the Atlantic Bank and Trust Company, Greensboro, N. C., which the Richmond bank accepted (pp. 9-10); and on the 15th forwarded it to the bank at

Greensboro, which wired plaintiff in error on the 17th that it was not then good, and the Richmond bank wired the Lumber Bridge bank. Later in the same day the draft was protested for non-payment and returned, and plaintiff in error was so advised by wire (p. 53). On the same day the Lumber Bridge bank replied by wire that the matter was being adjusted (p. 54). Nothing more was done about the matter until the 20th, when the plaintiff in error sent a representative to Lumber Bridge to procure a settlement (p. 60). On the 21st, four days after the wired advice of the protest, the Federal Reserve Bank of Richmond wired the Citizens and Southern Bank, of Atlanta, that the $9,000 check was unpaid and that it was charged back (p. 55). To the cashier of the Atlanta bank it seemed rather a long time to report on an item of this kind so he complained to the Richmond bank (pp. 46, 57), which replied that they thought it only fair that they should have communicated with the Lumber Bridge bank to see what explanation they had to offer before attempting to advise the endorsers on the items represented by the draft, that they were using every effort to get in touch with the Lumber Bridge bank but were unsuccessful, and that they had made arrangements to take care of their draft (p. 58). The record discloses no such arrangement. The Lumber Bridge bank was closed on the 24th (pp. 3, 7, 62).

Balfour's check was returned to him by the bank (p. 34), and no appeal was taken from that portion of the judgment discharging him from liability.

Malloy Brothers received no money for the check, and it was charged back to them by the Perry bank December 21st or 22nd (p. 32). The Bank of Lumber Bridge received the Balfour check on the 11th (p. 52), and sent its $9,204.90 draft on the 14th. Evidence of its financial condition on and after the 14th is shown on pages 35, 62-65 of the record. The findings of fact show (p. 28): "The Lumber Bridge Bank had, on Decem-

ber 14th, $16,816.00 and, so far as appears, on December 24th, 1920, when it went into the hands of a receiver, cash $4,574.00, and which, with balances in other banks aggregated about $11,000.00. It held also bills and notes to an amount not stated in the evidence."

In October, 1920, an employee of the Federal Reserve of Richmond, whose duty was to make agreements for banks to remit at par for their checks sent them, saw the cashier of the Bank of Lumber Bridge about remitting for checks, and he was told by the cashier that when plaintiff in error undertook to collect checks on all other banks in North Carolina it could send him his checks and he would remit for them, but the cashier would not sign an agreement to this effect, and he was told by this employee that he could remit either by draft or shipment of currency at the expense of the Richmond bank (p. 60). The record does not show that this condition was ever met by plaintiff in error. There is an allegation in the answer (article 3, p. 9) that the Bank of Lumber Bridge would, upon the day of receipt, return such checks as it was unwilling to pay and would remit for such checks as it desired to pay by means of its good exchange draft drawn upon some bank with which the Bank of Lumber Bridge kept an account and in which it had funds upon deposit. The Bank of Lumber Bridge was not a member of the Federal Reserve System (p. 52). It was not unusual for remittance drafts sent plaintiff in error by small banks to be dishonored (p. 62).

The Florida statute, approved June 8, 1909, mentioned in the opinion of the District Court (p. 19), is as follows:

> "Section 1. That when a check, draft, note, or other negotiable instrument is deposited in a bank for credit or for collection, it shall be considered due diligence on the part of the bank in the collection of

any check, draft, note, or other negotiable instrument so deposited, to forward *en route* the same without delay in the usual commercial way in use according to the regular course of business of banks, and that the maker, indorser, guarantor, or surety of any check, draft, note, or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and that when a bank receives for collection any check, draft, note, or other negotiable instrument, and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part, as aforesaid."

CONTENTIONS OF MALLOY BROTHERS.

Briefly stated, the defendants in error allege that by operation of law the Federal Reserve Bank of Richmond became their agent to collect the check; and that it was negligent: (1) in sending and surrendering the same to the drawee bank; (2) in accepting a worthless draft in payment, and that by so doing it made the draft its own; and (3) in failing to give prompt notice of the non-payment of the exchange draft and affording them an opportunity to collect from the Bank of Lumber Bridge before it was closed.

CONTENTIONS OF THE FEDERAL RESERVE BANK OF RICHMOND.

The plaintiff in error alleges: (1) that it was not an agent for Malloy Brothers because it had no agreement with them, and was responsible, if at all, solely to the Atlanta banks; and (2) that even if it were Malloy Brothers' agent it was not guilty of negligence because of a contract with the Citizens and Southern Bank permitting direct sending and under authority of the Federal Reserve Board; also that custom justified direct sending and acceptance of the exchange draft; and also

that prompt notice would have availed Malloy Brothers nothing.

The court held that the plaintiff in error was agent of defendants in error; that the regulation of the Federal Reserve Board entered into the contract between plaintiff in error and the Atlanta banks and justified the direct sending; that no negligence was committed by plaintiff in error so far as the prompt handling of the check and draft were concerned; but that the Federal Reserve Bank of Richmond exceeded its authority in accepting anything but money in payment of the check.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

This assignment is in effect that the judgment should have been for the plaintiff in error and it, therefore, practically covers the entire case.

THE FEDERAL RESERVE BANK OF RICHMOND WAS THE AGENT OF MALLOY BROTHERS.

The first question raised by plaintiff in error is Malloy Brothers' right to maintain this action against it. We submit that his Honor, Judge Connor, was correct in holding that the Florida act above quoted made the engagement of the Perry bank such that the collecting bank, if properly selected, became the sub-agent of and accountable to defendants in error (Record, pp. 19, *et seq*). It is held in *Exchange National Bank* v. *Third National Bank*, 112 U. S. 276, 28 L. Ed. 722 at 727, that:

> "The distinction between the liability of one who contracts to do a thing and that of one who merely receives a delegation of authority to act for another is a fundamental one, applicable to the present case. * * * Whether a draft is payable in the place where the bank receiving it for collection is

situated, or in another place, the holder is aware that the collection must be made by a competent agent. In either case, there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right, on the part of its owner, to presume that proper agents will be employed, he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in the one case which does not apply to the other. And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent and thus make a different contract and become responsible only for good faith and due discretion in the choice of an agent. * * * The nature of the contract is the test."

For other cases holding that the liability of a bank taking a commercial paper for collection *at home or abroad* whatever it may be without a special agreement or understanding, may certainly be fixed or varied by a special contract at the outset of the transaction, see a great number of cases cited in note in *Brown* v. *Peoples Bank*, 52 L. R. A. N. S., at p. 634.

It is clearly established that whenever, by express agreement between the parties, a sub-agent is to be employed to receive money for the principal, such sub-agent shall be deemed an agent of the principal. *Wilson* v. *Smith*, 3 How. 763, 11 L. Ed. 820; *Miller* v. *Farmer's and Merchant's Bank*, 30 Md. 292; *Farmer's Bank* v. *Owen*, 5 Cranch. C. C. 504, Fed. Cas. No. 4662; *Bank of Lindsborg* v. *Ober*, 31 Kan. 599, 3 Pac. 324; *City Natl. Bank* v. *Cooper*, 91 S. C. 91, 74 S. E. 366; *Bank of Washington* v. *Triplett*, 1 Pet. 25, 7 L. Ed. 37.

Agency arises only by contract, says plaintiff in error. It may also exist by operation of law. Elliott on Contracts, Secs. 2831-2; Mechem on Agency, Sec. 1; *State* vs. *Hubbard*, 58 Kans. 797, 39 L. R. A. 860; *Sterna-*

man v. *Metropolitan Life Ins. Co.*, 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. 625.

It will thus be seen that under all the authorities, following either the so-called Massachusetts or forwarding agent rule or the New York or independent contractor rule, where the first bank is authorized by law or contract to transmit to a sub-agent for collection, such sub-agent thereby becomes the agent for and responsible to the depositor or holder. When the plaintiff in error undertook the collection of the Balfour check it became the agent of and was accountable to Malloy Brothers, and it makes no difference through how many intermediate banks the check passed.

The Florida statute and the deposit slip made the Perry Banking Company a forwarding agent only for the collection of the check, and its duty was performed when the check was forwarded to the Atlantic National Bank of Jacksonville.

This principle appears to be conceded in the brief for plaintiff in error, which states at the bottom of page 15: "All courts seem to be agreed that if there was an express contract defining the relationship and liability of the bank to its depositor, the terms of this contract would control."

Both parties are in agreement that the Massachusetts rule prevails in this case. The plaintiff in error says it is because of Regulation J. of the Federal Reserve Board; the defendants in error, because of the Florida statute and the deposit slip. It was established by *First Nat. Bank* v. *Planter's, &c.*, 75 N. C. 534, and *Bank of Rocky Mount* v. *Floyd*, 142 N. C. 163, that the Massachusetts rule prevails also in North Carolina.

The contract was made in Florida for the collection of the check in North Carolina, payment to be made defendants in error in Florida. So the Georgia statute has no application. *Kent* v. *Dawson Bank*, 13 Blatchf. 237; *St. Nicholas Bank* v. *State Natl. Bank*, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 845.

For these reasons the authorities cited by plaintiff in error do not apply; and it will be noted that in *First Natl. Bank* v. *Federal Reserve Bank of Kansas City*, 283 Fed. 700, cited by appellant, it was the bank of deposit, as assignee of the depositors, suing the collecting bank, and it was held that it had no cause of action under the independent contractor principle, and also that it had not alleged the payment of any money or that it suffered loss.

Under the authority of this last case, the Citizens and Southern Bank of Atlanta, could not maintain this action against the plaintiff in error. Under the Florida act the Perry Banking Company could not do so either. It charged the check back to Malloy Brothers. (Record, middle p. 32.)

THE FEDERAL RESERVE BANK OF RICHMOND WAS NEGLIGENT IN SENDING THE CHECK DIRECT TO THE BANK OF LUMBER BRIDGE, NOTWITHSTANDING THE REGULATIONS OF THE FEDERAL RESERVE BOARD.

While the learned judge of the District Court held that under the Federal Reserve Act and the Regulation of the Federal Reserve Board plaintiff in error was authorized to send the check in suit direct to the Bank of Lumber Bridge, we do not concede the existence of such authority in so far as it binds Malloy Brothers.

The Federal Reserve Board Intended Regulation J for Member Banks and Not Innocent Depositors.

Attention is directed to the 11th section of the Federal Reserve Act prescribing the powers and duties of the Federal Reserve Board. The authority to promulgate regulation J is in no way conferred therein unless it be by Section j, which is: "To exercise general super-

vision over the said Federal Reserve Banks." Section 16, dealing with note issues, provides: "The Federal Reserve Board shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among the Federal Banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal Reserve Banks, or may designate a Federal Reserve Bank to exercise such functions, and may also require each such bank to exercise the functions of a clearing house for its member banks.

We respectfully submit that Regulation J of the Federal Reserve Board (p. 36) is a promulgation of rules governing the operation of Federal Reserve Banks while performing the functions of a clearing house, and that Malloy Brothers are not bound thereby, certainly not when they were ignorant of the existence of such rules. Malloy testified: "I know very little about the workings of a bank" (p. 32).

Clearing House Rules Are Not Binding on Malloy Brothers.

The banks which comprise a clearing association may enact such rules for the regulation of clearing house transactions as they deem proper. While these rules are binding upon the members of the association they are not, as a general rule, permitted to have any effect upon the rights of outsiders, such as depositors and other customers of the banks. Clearing house rules are not binding on such parties, nor have they the right to claim any benefit under them, unless they contract with reference to the rules. Brady on Bank Checks, Sec. 229, citing *People* v. *St. Nicholas*, 77 Hun. (N. Y.) 159, 28 N. Y. Supp. 407; *Nat. Union Bank* v. *Earle*, 93 Fed. 330; *Merchants Nat. Bank* v. *National Bank*, 139 Mass. 513, 2 N. E. 89; *Overman* v. *Hoboken City Bank*, 30 N. J. Law 61; *Louisiana Ice Co.* v. *State Nat. Bank*, McGloin (La.) 181.

See also *Dorchester* v. *Merchants Nat. Bank* (Tex.), 163 S. W. 5.

Plaintiff in error makes the point that it could not have received the check from Malloy Brothers direct. If this be true then defendants in error cannot be bound by the regulations of the Board which were not intended for them but only for the banks, and appellant cannot set up its own wrong as a defense.

It will be noted (Record, p. 41) that the depositions of J. E. Wallace and M. W. Bell were read in evidence over the objection of the defendants in error. Malloy's evidence (Record, p. 32) shows that he was ignorant of any contract or agreement between the banks handling this check. We also contended there was not sufficient proof of the contract alleged between the Federal Reserve Bank of Atlanta and the Citizens and Southern Bank of Atlanta, which was alleged to have been in writing and which was not shown to have been lost. It was likewise contended that the alleged contract between the Citizens and Southern Bank of Atlanta and the Atlantic National Bank of Jacksonville was not properly proven (Record, pp. 44 and 46). It is also in evidence (Record, pages 46 and 47) that there was no written agreement between the Federal Reserve Bank of Atlanta and the Citizens and Southern Bank of Atlanta by which the latter agreed in sending items direct to the Federal Reserve Bank of Richmond to be bound by any contract between the Federal Reserve Banks of Atlanta and of Richmond with reference to such items. Plaintiff in error attempted to show that the Citizens and Southern Bank of Atlanta was bound by Circular G-133, stating the terms and conditions upon which the Federal Reserve Bank of Atlanta would accept checks for collection, after its failure of proof that it had been furnished one of the circulars, by offering the testimony of the cashier of the Federal Reserve Bank of Atlanta to the effect that the Atlanta bank was a branch of the Citizens and Southern Bank of Savannah to which copies of the

circular were mailed. Malloy Brothers contended that if such were the fact it could not be shown in this manner, and that even were it true the Federal Reserve Bank of Atlanta dealt with the Citizens and Southern Bank of Atlanta direct and as a separate entity, and that it has officers and directors of its own who controls its affairs. We mention these matters to show that even if the defendants in error were bound by these alleged agreements such agreements were not proved.

"Direct Sending" is Negligence.

In *Winchester Milling Co.* v. *Bank of Winchester*, (Tenn.) 118 S. W. 248, 18 L. R. A. N. S. 441, Neil J., in holding that a bank receiving a check for collection is negligent in sending it to the drawee although it is the only bank in the place where it is located, says on page 446 (L. R. A. N. S.), after citing cases from Alabama, Colorado, Illinois, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Pennsylvania, Tennessee, Texas, and Federal cases: "We have examined all of the foregoing cases, except the last, which is not accessible to us, and find that they fully sustain the text to which they are cited." The later cases are then cited, and he says: "It is unnecessary to quote further from authorities on this side of the question. The only authorities to the contrary that we have any knowledge of are cited in Note 81, page 506, 5 Cyc. Law and Proc., being certain New York cases and some English cases and the case of *Kershaw* v. *Ladd*, 34 Or. 375. * * * We do not think the case of *Kershaw* v. *Ladd* sustains the text." He also distinguishes several of the other cases cited in the brief of plaintiff in error.

See also 3 R. C. L., Sections 255-258, title Banks, pages 627-630, where these views are discussed as the majority and minority views and that it is only in those few jurisdictions that custom, if established, is permitted

as a defense, and that in the many States following the prevailing view such usage and custom will not justify negligence.

The annotator to the note in 27 L. R. A. (*Anderson v. Rodgers*, 53 Kan. 542), says at page 249: "The result of the American decisions is entire unanimity in holding that it is not proper to send a check by mail directly to the drawee for payment, except in New York state, where, as shown above, the decision to the contrary cites as authority two other cases which do not exactly decide the question."

PLAINTIFF IN ERROR HAD NO RIGHT TO ACCEPT THE EXCHANGE DRAFT, AS COLLECTING AGENT FOR DEFENDANTS IN ERROR.

"That the power of a collecting agent, by the general law, is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities," says *Mr. Justice* Field, delivering the opinion in *Ward* v. *Smith*, 7 Wall. 447, 19 L. Ed., at page 210. See also long list of cases cited in note to case in 52 L. R. A. N. S., at page 652.

A collecting bank has no implied power to receive anything but money in payment. Usage will not justify the receipt of worthless checks in payment of collections. Elliott, Contracts, Sec. 1767.

It may be stated as the general rule that an agent for collection has not, unless specially authorized, the authority to receive payment in anything but cash. Upon elementary principles of agency, therefore, if such an agent does accept anything other than cash in payment he will be liable to his principal for any loss the latter may suffer, and this rule is applicable to banks acting

as collecting agents, and if such a bank surrenders the instrument in return for a check or other paper of the party upon whom it was drawn it does so at its own risk, and is liable, irrespective of negligence in the collection of the substituted paper, if that paper is not paid. 3 R. C. L., Title Banks, Sec. 245, page 616.

Custom cannot justify negligence. *Pinkney* v. *Kanawha Valley Bank*, 68 W. Va. 254, 32 L. R. A. N. S. 987, 69 S. E. 1012, Ann. Cas. 1912 B, 115; *Bank of Rocky Mount* v. *Floyd*, *supra*.

The acceptance by a bank, employed to collect commercial paper, of a check in payment, is at its own risk. *Bank* v. *Union Trust Co.*, 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029.

Where a bank accepts for payment any paper for that which it is employed to collect, its liability, in case the paper so accepted is not paid and the original paper surrendered, is measured by the face value of the original paper. *Winchester Milling Co.* v. *Bank of Winchester*, *supra*; *Kirkman* v. *Bank of America*, 165 N. Y. 132, 80 A. S. R., 714, 58 N. E. 753.

This check called for nine thousand *dollars*. We can not conceive that regulation J intended it should be paid with a worthless draft instead. If such were the intent, then the effect is the impairment of the obligation of contracts, and congress did not intend to delegate such power to the Federal Reserve Board, we are confident. No State may do so; and Congress could not delegate this power if it desired. 6 R. C. L., page 164.

The obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. Legal Tender cases, 12 Wall. at 548, 20 L. Ed. at 311.

It will not be presumed that an agent had authority to accept a draft on a third person in payment of a debt due the principal. *Rogers* v. *Tiedeman*, 98 Ga. A. 811, 72 S. E. 285.

The Acceptance of the Draft Was in Violation of the North Carolina Law.

It can never be held that an authority to accept in payment cash in New York or Baltimore funds will extend to accepting in payment the bill of insolvent debtor, no matter upon whom it may be drawn; for the credit of a bill is not enhanced by the credit of the drawee until acceptance. *Goldsborough* v. *Turner*, 67 N. C., at 410.

An attorney can not compromise his client's case without special authority to do so, nor can he, without such authority, receive in payment of a debt due his client anything except the legal currency of the country, or bills which pass as money at their par value by the common consent of the community. *Moye* v. *Cogdell*, 69 N. C. at 95.

The Legislature of North Carolina, at the 1921 session, passed an act with reference to banks, it being Chapter 20, the sections material to this argument being as follows:

> Sec. 2: "That in order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this state, all checks drawn on said banks and trust companies shall, unless specified on the face thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said drawee bank when any such check is presented by or through any Federal Reserve Bank, postoffice or express company, or any respective agents thereof."
>
> Sec. 5: "That no officer in this state shall protest for non-payment any check or checks drawn on any bank or trust company chartered by this State when payment is refused by the drawee bank solely on account of failure or refusal of the holder or owner thereof to pay exchange charges herein authorized; and there shall be no right of action, either in law or equity, against any bank or trust com-

> pany chartered by this State, for refusal to pay any such check when such action is based alone on the ground of refusal to pay exchange or collection charges herein authorized."

If the Bank of Lumber Bridge had the right in 1920 to pay the checks drawn on it by means of exchange drafts, then this act was wholly unnecessary, and we submit that the act is conclusive evidence that prior to its enactment in 1921 North Carolina recognized authority to make remittance in money only. Under this act the exchange provided for must be on the reserve deposits of the drawee bank and not on some bank where there are not sufficient funds, as in the case at bar.

This is the act that was passed on in *Farmers Bank of Monroe, N. C., et als.*, v. *Federal Reserve Bank of Richmond*, 67 L. Ed. 737, 43 S. C. R. 641, where it is said (L. Ed. at 742-3):

> "The purpose of the statute, as its title declares, was to promote the solvency of state banks. We should, in the absence of controlling decision of the highest court of the state to the contrary, construe the statute not as authorizing payment in a 'bad' draft, but as authorizing payment in such exchange drafts only as had customarily been used in remitting for checks. * * * Furthermore, the checks which the Federal Reserve Act declares reserve banks may receive for collection are limited to those 'payable on presentation.' The expression would seem to imply that the checks must be payable either in cash or in such funds as are deemed by the reserve bank to be an equivalent. A check payable at the option of the drawee by a draft on distant reserves would seem not to be within the limited class of checks referred to in the act."

If the Balfour check was such that the Richmond bank was authorized by the act of Congress to collect, then the conclusion seems irresistible that it deemed the draft equivalent to cash, and having made such election

it ought not to be permitted to pass its loss on to the depositors, who did not have the right of election. Furthermore, one of the defenses in this case is that believing it had power under the act and regulation to do so, it attempted to make an agreement with the Bank of Lumber Bridge for it to remit *daily* for checks sent the latter, "by a draft *or* shipment of currency at our expense (Hale, p. 60).

Section 74 of the Negotiable Instruments act, in force in Virginia, North Carolina and Florida, provides: "The instrument must be exhibited to the person from whom payment is demanded, and, when it is paid, must be delivered up to the party paying it." (Virginia laws of 1898, ch. 866; Florida laws of 1897, ch. 4524; North Carolina laws of 1899, ch. 733, now ch. 58 of the consolidated statutes of N. C.)

The Supreme Court of North Carolina has not construed the 1921 act of that state "as authorizing payment in a 'bad draft.'" Diligent search reveals no holding by that court that the instrument may be delivered up until it is paid, except at the peril of the collecting agent.

Acceptance of Exchange Draft Was in Violation of Regulation J.

As will be seen by Regulation J (Record, p. 36) the Federal Reserve Board states that each Federal Reserve Bank is authorized "to receive from any non-member bank or trust company, solely for the purposes of exchange or of collection, deposits of current funds in lawful money, National bank notes, Federal Reserve notes, checks and drafts payable upon presentation, or maturing notes and bills, *provided such non-member bank or trust company maintains with its Federal Reserve Bank a balance sufficient to offset the items in transit held for its account* by the Federal Reserve Bank." (Italics ours.)

Section 13 of the Federal Reserve Act provides that "any Federal Reserve Bank * * * solely for the purposes of exchange or of collection, may receive from any non-member bank or trust company deposits of current funds in lawful money * * * checks and drafts payable upon presentation * * * provided such non-member bank or trust company maintains with the Federal Reserve Bank of its district a balance sufficient to offset items in transit held for its account by the Federal Reserve Bank."

Thus it will be seen that Section 8 of the Regulation (Record, p. 39) authorizing Federal Reserve Banks to send checks for collection to banks on which checks are drawn, is only in cases where the bank transmitting checks for collection maintains the required balance, to save the collecting bank free from loss resulting *from or for* the account of the other Reserve Bank so forwarding the items to the collecting bank. In other words, the Federal Reserve Board realizing the danger of direct sending requires indemnity against resulting loss.

While defendant was authorized to receive Balfour's check on Lumber Bridge for collection, there is no authority in either the act or the regulation for it to receive the exchange draft it accepted in payment from the Bank of Lumber Bridge, unless it maintained the required balance to offset the item.

The Federal Reserve Bank of Richmond is chargeable with knowledge of the Florida act, where the rights of Malloy Brothers became fixed when they deposited the check in the Perry (Fla.) bank. The Citizens and Southern Bank of Atlanta is likewise chargeable with knowledge of the status of the transaction under the Florida law—that the collecting bank became the agent of, and accountable to, the depositor. Malloy Brothers had no voice in the selection by the Atlanta bank of the collecting agent.

In both Georgia and Virginia the presumption is that the check is deposited for collection and that title does not pass to the bank, unless it was so intended.

When a check is deposited in the usual course of business it is taken generally for collection, and the title does not pass to the bank. *Baldwin State Bank* v. *National Bank*, 144 Ga. 181, 86 S. E. 538.

Where a check on another bank is endorsed without restriction, deposited, and the amount credited to the depositor, the bank reserving the right to charge it back, if not paid, whether the bank becomes the owner of the check depends solely upon the intention of the parties, even though the depositor is permitted to draw against the deposit. *Miller* v. *Norton & Smith*, 114 Va. 609, 77 S. E. 452.

Plaintiff in error, therefore, could not treat the item as the property of the Atlanta bank. The check was charged back by the Perry bank to Malloy Brothers, and there is no evidence that the deposit had been checked against (p. 32).

CONCLUSION OF FIRST ASSIGNMENT OF ERROR.

As heretofore shown, most of the cases cited in appellant's brief are decisions holding that, in the absence of anything to the contrary, the bank of deposit undertook the collection as an independent contractor, and the reasoning does not apply in the case at bar where the Perry bank became a forwarding agent only and the Federal Reserve Bank of Richmond became the collecting agent of Malloy Brothers.

Doubtless realizing the unsoundness of the contention that Regulation J authorized the acceptance of a worthless draft, our opponent seeks to enlarge this regulation by adding to it words that might cover this case, as shown at page 17 of its brief, had drawee kept a balance with appellant to offset the item.

There is nothing in the record to show that the exchange draft had not been sent when Balfour's check was marked "paid" on December 14th, nor that the Bank of Lumber Bridge was insolvent on that day. Had

it been, we think this would only add weight to the liability of the collecting agent for accepting the exchange draft.

There is no contention that appellant was a *bona fide* holder for value and without notice of the check in question. Authorities heretofore cited show the presumption was that its predecessors acquired the check for collection only and the Richmond bank had the right to and did charge back the item to the Citizens and Southern Bank.

The alleged agreement between the Richmond and Lumber Bridge banks required the latter to remit *daily* for checks it accepted. Remittance therefor should have been made on December 11th. Yet plaintiff in error waited until the 15th to receive a worthless draft and further indulged the Bank of Lumber Bridge—to see what explanation it had to make—until the 21st. Had compliance with the alleged agreement been insisted upon Malloy Brothers could have learned of the situation more than a week earlier than they did. Due diligence would have afforded defendants in error an opportunity to have gotten their money out of the $16,810 the District Court found (page 28) that the Lumber Bridge bank had on hand. After making them moneyless it ill becomes the appellant to say their effort would have been fruitless. Shall this indulgence be at the expense of Malloy Brothers, innocent parties in this transaction?

SECOND ASSIGNMENT OF ERROR.

This finding is: "There is no evidence of any custom existing either in Virginia or North Carolina, by which collecting banks are *authorized* to accept from their agents or subagents, or from the drawee banks in settlement of collections sent them, anything other than money in settlement of such collection," etc., (pp. 27 and 28, Assignment, pp. 73 and 85). The effect of such finding is, of course, that there is no evidence of an author-

ized custom. There is a further finding that appellees knew nothing of the usage or custom of banks in collecting checks delivered to them for collection or knew anything concerning the previous methods of dealing between the Federal Reserve Banks of Richmond and of Atlanta and the Citizens and Southern Bank (p. 70). Mr. Wallace's testimony was found insufficient to support a finding that there was any authorized custom to this effect. This finding that the collecting agent had no right to accept from the drawee bank anything except money for the Balfour check is fully sustained by a wealth of the best considered cases and text writers in this country, as heretofore shown; and it makes no difference whether the banks are located in the same town or not.

Appellant states in its brief, page 18, that Mr. Wallace's testimony was not offered to prove that the Federal Reserve Banks were authorized to send checks direct to the banks on which they were drawn, but only to show the intent and meaning of the regulations of the Federal Reserve Board, so it seeks to justify the direct sending not by reason of banking customs but because of Regulation J only; and as heretofore pointed out, it was not justified in so doing by the regulations of the Federal Reserve Board.

THIRD ASSIGNMENT OF ERROR.

We agree with appellant's counsel that this assignment is merely formal and that repetition is useless.

CONCLUSION.

We submit that it is established:

1. That when plaintiff in error accepted the check for collection it became the sub-agent of and was accountable to appellees.

2. That appellant was negligent in *surrendering* the check to the drawee bank.

3. That it was negligent in accepting the drawee's exchange draft in payment, and that it thereby made the paper its own.

4. That the regulations of the Federal Reserve Board do not justify but condemn this course of dealing.

5. That the Federal Reserve Bank of Richmond failed to use due diligence in waiting an unreasonable length of time on the Bank of Lumber Bridge, after mailing the check to it, and also before giving notice after learning of the protest of the draft.

Public confidence in banks is the greatest assets of these guardians of the country's savings. Had there been a suspicion that such deposit would result in the absolute surrender of the check to the drawee without obtaining the money therefor by a Federal Reserve Bank or any other bank, and that it could escape all liability, would the deposit have been made? What would be the use of a party placing his check in the hands of a bank for collection when that duty could be performed by merely endorsing the paper and sending it by mail to the party who is obligated to pay it, and receive his check in return? The plaintiffs could have sent the check direct to the Bank of Lumber Bridge and received another check in return several days before the Balfour check ever reached the appellant.

When it is remembered that the transaction was during a time of financial depression, particularly acute in the cotton producing sections; that plaintiff in error well knew that it was not unusual for remittance drafts by small banks to be dishonored; and that Malloy Broth-

ers were without laches and without knowledge of the alleged banking agreements and customs, then these innocent parties ought not to bear the loss, and the judgment should be affirmed.

Respectfully submitted, this 19th day of December, 1923.

ROBERT H. DYE,
Fayetteville, N. C.,
Counsel for Defendants in Error.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 553.

FEDERAL RESERVE BANK OF RICHMOND,
PLAINTIFF IN ERROR,

versus

D. J. MALLOY & J. H. MALLOY, TRADING AS MALLOY BROTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

M. G. WALLACE,
Counsel for Plaintiff in Error.

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Supreme Court of the United States

FEDERAL RESERVE BANK OF RICHMOND,
PLAINTIFF IN ERROR,

versus

D. J. MALLOY AND J. H. MALLOY, PARTNERS, TRADING AS MALLOY BROTHERS,
DEFENDANTS IN ERROR.

REPLY BRIEF FOR FEDERAL RESERVE BANK OF RICHMOND, PLAINTIFF IN ERROR.

ANSWER TO THE CONTENTION THAT THE FEDERAL RESERVE BANK OF RICHMOND WAS THE AGENT OF MALLOY BROTHERS.

(Brief for Defendants in Error, pp. 6-9.)

In our brief we cited certain Federal cases holding hat when a check is routed for collection through sev- ral banks each successive bank may be sued only by its mmediate predecessor. We concede that there is an rreconcilable conflict of authority upon this point. We ubmit, however, that the rule which limits the right of ction to the immediate predecessor is the wiser and bet- er rule, for if a remote party may sue a bank which has eceived a check from another bank and may repudiate

all notice of previous dealings and also special contracts between the two banks which dealt directly with each other, it is obvious that no bank may safely accept a check from another bank for collection, for no matter what agreement or understanding it may have with the bank from which the check was received, there will always be danger that some remote party will attempt to bring an action, contending that such party is in no way bound by the contract or understanding, in pursuance of which alone the check was accepted for collection.

However, we wish to call especial attention to the fact that under the authorities cited by our opponents, and under any rule which might be adopted, if the Federal Reserve Bank of Richmond is to be deemed a subagent of Malloy Brothers, it must be likewise held that the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank were agents for Malloy Brothers, and, being agents, entrusted with a check endorsed in blank and held out to the world as having full power to make arrangements for its collection, being to all appearances, in fact, owners of the check, any contract or understanding made by the Citizens & Southern Bank is necessarily binding upon Malloy Brothers, the remote principal. Our opponents seem to attempt to occupy two inconsistent positions. They contend that the Federal Reserve Bank is the agent of Malloy Brothers, but likewise contend that this agency arose by mere fiat of law and that the Citizens & Southern Bank was in no sense of the word an agent for Malloy Brothers. We respectfully submit that to establish one of these contentions would be to absolutely defeat the other. Each successive bank must have been the agent of Malloy Brothers, or else no bank, save the Perry Banking Company, can be deemed the agent of Malloy Brothers.

If the Citizens & Southern Bank was not the agent of Malloy Bros., then they have no right of action. If

the Citizens & Southern Bank was the agent of Malloy Bros. and, as such agent, appointed the Federal Reserve Bank of Richmond as a sub-agent, Malloy Bros. are bound by the terms of the appointment, and in ascertaining the terms of this appointment all agreements between the Federal Reserve Banks and the Citizens & Southern Bank are binding upon Malloy Bros., and all knowledge possessed by the Citizens & Southern Bank is imputable to Malloy Bros.

Our opponents appear to attempt to avoid this dilemma by the contention that the agency of the Federal Reserve Bank originated by more fiat of law and did not arise out of the contracts made between it and the Citizens & Southern Bank and the Federal Reserve Bank of Atlanta.

We will not attempt to enter upon a philosophical discussion as to whether or not a relation which arises by fiat of law may be ever aptly termed an agency. We concede that the term "agency" has been, by some courts and some text writers, applied to relationships which arise out of quasi contracts and that quasi contracts are, of course, obligations which have some resemblance to true contracts, but which do not arise from the voluntary assent of the parties. An examination of the authorities cited upon this point by our opponents will show that they can have no application to the present case.

It was decided by this court in *American Bank & Trust Company* v. *Federal Reserve Bank of Atlanta*, October Term, 1922, opinion delivered June 11, 1923, and in *Farmers & Merchants Bank* v. *Federal Reserve Bank of Richmond*, October Term, 1922, opinion delivered June 11, 1923, 43 Supreme Court Reporter 641, that a Federal reserve bank is under no obligation to accept a check payable by a non-member bank. The Bank of Lumber Bridge was a non-member bank. The Federal Reserve Bank of Richmond was, therefore, not bound to accept checks drawn upon it.

When the check in suit was tendered to the Federal Reserve Bank, it had the right to accept it for collection or to refuse to handle it. If it did accept the check for collection, its act in accepting it created an express or actual contract, and we have simply to discover the terms and conditions of the contract.

It is elementary that in order to interpret contracts we must look first to the express intent of the parties. If the intent is not completely expressed, we must look to the inferences which may be drawn from their acts, and in drawing these inferences we must consider the usual customs prevailing between other parties in similar situations, and we must look to the law of the State in which the contract was made, as determining all questions relating to the interpretation and validity of the contract, and to the law of the place in which the contract is to be performed as determining all questions relating to the performance. In this case, the Federal Reserve Bank of Richmond received the check merely as the deputy or substitute of the Federal Reserve Bank of Atlanta. It received it in virtue of an agreement between the Citizens & Southern Bank of Atlanta and the Federal Reserve Bank of Atlanta, both of which were in the State of Georgia. The contract was to be performed in the State of North Carolina. We respectfully submit that, regardless of whether or not the contract was in writing or inferred from previous dealings, or from the actions of the parties, it was a contract made in Georgia and to be performed in North Carolina. The law of Florida cannot enter into its interpretation or application.

ANSWER TO THE PLAINTIFF'S CONTENTION THAT THE FEDERAL RESERVE BANK OF RICHMOND WAS NEGLIGENT IN SENDING THE CHECK DIRECT TO THE BANK OF LUMBER BRIDGE, NOTWITHSTANDING THE REGULATIONS OF THE FEDERAL RESERVE BOARD.

(Brief for Defendants in Error, pp. 9-13.)

Under this head the defendants in error appear to take the position that the learned judge of the district court rendered the right judgment but based his decision upon erroneous reasons.

The learned judge below held, and, we believe, held correctly, that Regulation J stated completely the terms and conditions upon which the Federal reserve banks could receive checks for collection and were, therefore, binding upon all persons. The Federal Reserve Board is given power to regulate the charges made by Federal reserve banks for collecting checks. Federal Reserve Act, Sec. 16. It is obvious that the degree of responsibility and the methods employed in collecting must, to a large extent, determine the charge which is made for the service of collecting. Hence, the Federal Reserve Board, in regulating the Federal reserve bank and in fixing the charges which it may make when it receives checks for collection, must have, and under the portion of the Federal Reserve Act quoted in our opponents' brief has, power to prescribe uniform rules of liability, and all persons who deal with Federal reserve banks must take notice of the uniform terms and conditions of liability.

By a similar line of reasoning, this court, in the case of *Union Telegraph Co. v. Esteve*, 256 U. S. 566, 41 Sup. Ct. Rep. 587, held that the limitations upon the liability of a telegraph company which entered into and formed

a part of its tariff bound all persons, even though such persons did not know and could not know of the existence of the limitations. The court says: "Uniformity demands that the rate represent the whole duty and liability of the company. It could not be varied by agreement; still less could it be valid by lack of agreement. Assent to the terms of the rate was rendered immaterial, because when the rate is used dissent is without effect."

It is not, however, necessary for the court to go as far in this case as the court went in the Esteve case cited *supra*, for, in this case, it is clear that the limitations of liability contained in Regulation J have been made the subject of an express contract between the Citizens & Southern Bank and the Federal Reserve Bank of Atlanta, although our opponents seek to contend that this contract was not clearly and definitely proven. It appears from the testimony of M. W. Bell (Record, page 47) that Circular G-133, the pertinent portions of which are printed in the Record on page 44, was sent to the Citizens & Southern Bank, copies being sent to the main office in Savannah and, for convenience, also sent to the branch office in Atlanta. It is true that J. E. Wallace, Assistant Cashier of the Citizens & Southern Bank, stationed at its Atlanta office, testified (Record, page 45) that he did not recall having signed any copy of this circular, but he thought a copy was received and he stated that he was familiar in a general way with the collection system of the Federal Reserve Bank of Atlanta. If affirmatively appeared, however, that the circular was received at the home office in Savannah and receipt thereof was acknowledged, W. B. Spann, Jr., Assistant Cashier, signing the acknowledgment and formally agreeing, on behalf of his bank, to be bound by the terms and conditions in the circular. (See Record, page 47.)

Our opponents seem to take the position that a contract signed by an officer at the home office is not binding in dealings with branches, but we have always considered

that it was elementary that a corporation was but one person and that a contract made by one of its duly authorized officers, having general supervision of its business, bound the corporation as a whole, and, therefore, covered all dealings, no matter whether they originated with the home office or a branch. This elementary rule of general law appears to have been declared by statute in Georgia. Act of General Assembly of Georgia, No. 105, Session of 1919, Article 1, Section 3 (see Georgia Laws of 1919, page 136), is as follows (Italics ours):

> "*Branch banks.* Banks whose capital has been fully paid in, and is unimpaired, may establish branches in the cities in which they are located or elsewhere, after having first obtained the written approval of the Superintendent of Banks, which approval may be given or withheld by the Superintendent in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch.
>
> "Such branch banks shall be operated as branches and under the name of the parent bank, and *under the control and direction of the Board of Directors and executive officers of* said parent bank.
>
> "*The Board of Directors of the parent bank shall* elect a cashier, and such other officers as may be required to properly conduct the business of said branch, and a Board of Directors, or loan committee, who shall be responsible for the conduct and management of said branch, but not of the parent bank or any other bank, save that of which they are officers, directors, or committee."

It will appear from the above quoted provision that by the statute of Georgia officers at the home office have general supervision of all branches. We believe that this provision is in accord with usual corporate practice. The actions of Mr. Spann show clearly that he knew that when he signed the circular and agreed to its terms, it

lay with him to bring home notice of this contract to all of the branches, for he wrote (see Record, page 48) to the Federal Reserve Bank of Atlanta, requesting additional copies, stating that he intended to distribute them among the departments requiring the information.

THE GEORGIA STATUTE.

If, however, we assume that Regulation J is of no force or effect, and that the circular received and acknowledged by the Citizens & Southern Bank is likewise of no effect, we will then have it that the check in question was forwarded to the Federal Reserve Bank of Richmond for collection for the credit of the Federal Reserve Bank of Atlanta, just as if it had been by the Citizens & Southern Bank deposited in the Federal Reserve Bank of Atlanta and by that bank sent to Richmond. If the Citizens & Southern Bank had sent its clerk to the counter of the Federal Reserve Bank of Atlanta and deposited the check for collection, and there had been no understanding or agreement concerning the liability and there had been no regulation of the Federal Reserve Board in force, the situation would have been simply that of any depositor who places a check for collection in his bank. He thereby makes a contract, indefinite in its terms, but which, like any other contract, is to be ascertained by the *lex loci contractus* and the *lex loci solutionis*. (See *Scudder* v. *Union National Bank*, 91 U. S. 406.) This contract was made in Georgia and, from its nature, could be performed only in North Carolina. At the time that the contract was made, there was in force in Georgia a statute defining the liability of any bank *doing business within that State*. Section 36 of Article 19 of the Georgia Laws for 1919 is as follows:

"Forwarding Check Direct to Payer.—Any

bank, or banker, doing business in this State, receiving for collection or deposit, any check, note or other negotiable instrument drawn upon or payable at any other bank, located in another city or town, whether within or without this State, may forward such instrument for collection directly to the bank on which it is made payable, and such method of forwarding direct to the payer shall be deemed due diligence, and the failure of such payer bank, because of its insolvency, or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor; provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument."

It seems to us that it is plain that the Federal Reserve Bank of Atlanta must be deemed a bank doing business in the State of Georgia. It made in Georgia a contract for the collection of a check payable in North Carolina. The extent of its authority as agent and the methods which it might safely adopt in collecting the check are to be determined, in the absence of express agreement, by the statute of Georgia declaring the powers and liabilities of a collecting agent in such cases. The statute plainly provided that the check might be sent directly to the bank on which it is made payable and that such method of collecting should be deemed due diligence and that the forwarding bank should not be liable because of the insolvency or other default of the drawee. Since the Federal Reserve Bank of Atlanta might have sent the check directly to the Bank of Lumber Bridge, it might, of course, send it to the Bank of Lumber Bridge through the Federal Reserve Bank of Richmond, without incurring any liability because of the insolvency or other default of the Bank of Lumber Bridge.

While we think that the Georgia statute, rather than the laws of North Carolina, should be applied to the questions in this case, if the court should be of a different

opinion we call attention to the fact that there is in force in North Carolina a statute substantially similar to that in force in Georgia. Section 233 of the Consolidated Statutes of North Carolina reads as follows:

> "Collections Forwarded to Payer Bank.—Any banking corporation or banking and trust company, doing a fiduciary buisness, hereinafter called the bank, doing business in this State, receiving for collection or deposit any check, note or other negotiable instrument drawn upon or payable at any other bank, located in another city or town whether within or without this State, may forward such instrument for collection directly to the bank on which it is drawn or at which it is made payable, and such method of forwarding direct to the payer shall be deemed due diligence; and the failure of such payer bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: Provided, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument. The provisions of this section shall not apply where there is more than one bank in a town."

There was but one bank in the town of Lumber Bridge. A Federal corporation is to be considered as domiciled and resident in every State in which it actually conducts its business. (*Texas & P. Railroad* v. *Arnecutt*, 92 S. W. 57, *in re*: *Cushings Estate*, 87 N. Y., Supplement 795). It appeared that the Federal Reserve Bank of Richmond was actively engaged in collecting checks in North Carolina. (Record, page 60.)

We, therefore, respectfully submit that the Federal Reserve Bank of Richmond is a banking corporation doing business in the State of North Carolina, within the meaning of the above mentioned statute, if such statute is applicable.

We make no attempt to analyze or discuss the true

interpretation of the circular of the Federal Reserve Bank of Atlanta viewed as an express contract, or of the statute of Georgia, or of the statute of North Carolina. We call attention to the fact, however, that all of them establish a rule of liability substantially identical with that embodied in Regulation J. Consequently, all that we have said with respect to the interpretation of Regulation J applies also to the interpretation of the circular and the statutes.

We conclude upon this point that the right of Malloy Brothers, if any, arises out of the fact that they were privy to the contract for the collection of the check by and between the Federal Reserve Bank of Atlanta and the Citizens & Southern Bank. If Malloy Brothers may maintain any action at all, they must maintain it upon this contract, for if each successive bank handling the check became their agent, the Citizens & Southern Bank was their agent, and since it was an agent acting for undisclosed principals, if the principals sue upon the contract made by the agent they thereby ratify it *in toto* and become bound by it as fully and as effectually as if it had been made with them in the first instance. The principals, in other words, stand in the shoes of the agent, and merely as a matter of convenience in procedure the suit proceeds in the name of the principals. The action is determined as though it had been brought by the agent.

We think that the above fully answers all that our opponents can say upon their point that Regulation J applies only to dealings between Federal reserve banks with member banks and clearing member banks. All checks which a Federal reserve bank receives must, of necessity, be received from members banks, clearing member banks, or certain public officers and agents. It can make no difference whether the member bank or clearing member bank is the holder of the check or itself an agent. If the check be endorsed in blank, the bank collecting it is held out to the world as the holder and it

may, therefore, contract with reference to the check as though it were the holder. If the depositor or customer of the member bank or clearing member bank seeks to sue upon the contract which the member or clearing member bank has made, he must stand in its shoes.

ANSWER TO THE CONTENTION OF THE DEFENDANTS IN ERROR THAT THE PLAINTIFF IN ERROR HAD NO RIGHT TO ACCEPT EXCHANGE DRAFT AS COLLECTING AGENT FOR THE DEFENDANTS IN ERROR.

(Brief for Defendants in Error, pp. 13-15.)

In our brief, pages 12 to 24, we discussed at length the right of the Federal Reserve Bank to send this check to the drawee and to accept an exchange draft in payment. We will not repeat that discussion but will only add that we did not contend that a collecting bank may, without assuming responsibility, send checks directly to the drawee for remittance unless expressly authorized to do so. We concede that under the great weight of authority it has been repeatedly held that collecting banks may not send checks directly to the drawee unless expressly authorized to do so, but the development of the banking business has demonstrated that the dangers inherent in this practice, are less than the advantages which may be obtained from it and that banks usually do handle checks in this way. It was the plain object of Regulation J, and of the statute which we have quoted above, to sanction the modern practice and method of sending checks directly to the drawee bank for remittance and to relieve collecting banks of liability for losses resulting from this practice, thereby changing the rule which had been applied in such cases as *Bank of Rocky Mount* v. *Floyd*, 142 N. C. 187. We do not con-

tend that ordinarily a collecting agent should surrender a negotiable instrument before it is paid. We concede that the great weight of authority holds that if the agent does this he renders himself liable, but all authorities admit that the principal may authorize the agent to do so, and we contend that to authorize an agent situated in Richmond to send a check to the bank upon which it is drawn, which bank is in a city or town one hundred or one hundred and fifty miles distant, is by necessary implication to authorize the bank to surrender the check before payment is received, for there is no practical way by which a person in Richmond may send a check to the town of Lumber Bridge and yet retain control over it and refuse to surrender it until payment is received. We might, at this point, repeat that we have challenged our opponents to outline any method which the Federal Reserve Bank of Richmond could have pursued under which it could have sent this check to Lumber Bridge and prevented the bank of Lumber Bridge from cancelling it before the exchange draft sent in remittance could have been collected. Our opponents have suggested no method, and we respectfully submit that if a collecting bank must, at its peril, prevent a bank upon which a check is drawn from cancelling it before remittance is made, or must, at its peril, see to it that the remittance draft is good before accepting the check, the collecting bank cannot send the check to the bank upon which it is drawn without becoming absolutely responsible for all the defaults of the drawee bank. If such a construction be given to Regulation J and the statutes which we have quoted, they become meaningless, and it is not to be thought that the Legislature of Georgia, and the Legislature of North Carolina, and the Federal Reserve Bank Board have established a rule of liability which provides in effect, that a bank may do that which it is physically impossible for anyone to do.

ANSWER TO PLAINTIFF'S CONTENTION THAT THE ACCEPTANCE OF EXCHANGE DRAFT WAS IN VIOLATION OF REGULATION J.

(Brief for Defendant in Error, pp. 15-19.)

In this portion of their brief, the defendants in error appear to take the position that a Federal reserve bank should not accept for collection any check unless it was drawn upon a bank which maintained a balance in the hands of the Federal reserve bank. This question was elaborately argued in the case of *American Bank & Trust Co. et als.* v. *Federal Reserve Bank of Atlanta*, October Term, 1922, opinion delivered June 11, 1923, 43 Sup. Ct. Rep. 649. In that case the court held that a Federal reserve bank might receive for collection any check payable upon presentation. This necessarily meant checks upon three classes of banks: member banks, clearing member banks which maintain accounts in the hands of Federal reserve banks, and non-member banks which maintain no clearing accounts.

We, of course, do not contend that the regulations contemplated that the Federal reserve bank should accept a worthless exchange draft in settlement for checks received for collection, and we concede that if the Federal Reserve Bank knew that the exchange draft was worthless or was not drawn against an available balance, the draft should have been refused, but there is, of course, no practical way by which any person may ascertain whether or not a draft is good, or is drawn against a sufficient balance until it be presented. Therefore, when the remittance draft was received by the Federal Reserve Bank of Richmond, it could not tell whether it was good or not until it was presented. It was compelled, therefore, to accept the draft and present it in order to determine whether or not it was good. The Federal Reserve Bank of Richmond had been for some

time accepting drafts from the Bank of Lumber Bridge and these drafts had been uniformly good. (See testimony of Edward Waller, Jr., Record, page 59.) The acceptance of the draft could not, therefore, be called negligence, and, as we pointed out in our brief, the district court seemed to recognize this.

THE FEDERAL RESERVE BANK OF RICHMOND HANDLED THE CHECK AND THE REMITTANCE-DRAFT PROMPTLY AND DILIGENTLY.

In the courts below, counsel for the defendants in error vigorously contended that the facts in this case showed that the Federal Reserve Bank of Richmond had not been prompt and diligent in handling the check and exchange draft. The learned judge of the district court disposed of this contention by saying (Record, page 23):

> "This (the forwarding of the check) was done promptly. The check was mailed at Atlanta, December 8th, mailed by the defendant, Federal Reserve Bank, December 10th, 1920, and received by the Lumber Bridge Bank, December 11th, 1920, being Saturday.
>
> "The Lumber Bridge Bank was the only Bank in the town at Lumber Bridge. There is no suggestion that, at that time, it was not in good standing and credit, or that defendant, Federal Reserve Bank of Richmond, had any cause to question its solvency or manner of conducting its business. It had made a 'par collection' agreement with defendant Bank.
>
> "I am led to the conclusion that the defendant, Federal Reserve Bank of Richmond, was not negligent in sending the check to the Lumber Bridge Bank for collection, and that it acted in that respect, promptly and in accordance with the terms upon which it accepted and undertook to act as agent in collecting the check."

We think that this ruling of the trial judge has eliminated all questions of delay from this case, and our opponents seem inclined likewise to this conclusion, for they appear to make no independent argument upon the point; but, inasmuch as their brief contains several allusions to delay, we undertake to state briefly the manner in which the check was handled, in order that this court may see that the Federal Reserve Bank of Richmond handled the check and the remittance draft promptly and in accordance with the terms upon which it undertook to act as an agent in collecting the check.

The Balfour check was received in Richmond on December 10, 1920, and was forwarded to Lumber Bridge on that day. It was probably received on December 11th. That being a Saturday and usually a half-holiday in banking circles, the remittance could not have been received in Richmond before December 13th, and, since banks frequently fail to handle letters received by them on Saturday, laying them over until Monday, and since delays in the mail are not unusual, especially shortly before Christmas when the business of the post office is exceptionally heavy, there was no occasion for comment upon any delay before Tuesday, December 14th. The remittance draft was sent upon that day and received on December 15th. As we have stated above, there was every reason to think that this remittance draft was good, and it was immediately forwarded to the Atlantic Bank & Trust Company of Greensboro, North Carolina. It should have been received by them on the 16th. If they did not accept and pay the draft, they had until the close of the succeeding business day in which to give notice of its dishonor. The notice of dishonor was given to the Federal Reserve Bank of Richmond on December 17th. The Federal Reserve Bank of Richmond immediately notified the Bank of Lumber Bridge that the remittance draft was dishonored. It might be said at this point that a check for $9,000.00 is an exceptionally large

check for a bank the size of the Bank of Lumber Bridge, and small country banks operate upon very small reserves. Hence, it was not an alarming circumstance that this exchange draft should be dishonored on first presentation, as this might readily occur from a temporary depletion of reserves or some delay in the transfer of funds. Under date of December 17th, at 4:35 P. M., the Bank of Lumber Bridge wired that the matter was being adjusted. Surely it was not unreasonable to allow them twenty-four hours to cover their draft before advertising to the world that they had defaulted in payment.

Opposing counsel have apparently, in their opening statement, made a slight mistake in stating that the record does not show this wire from the Bank of Lumber Bridge, for it is to be found on page 54.

December 18th was Saturday; the 19th was Sunday. A special representative was sent by the Federal Reserve Bank to the Bank of Lumber Bridge and arrived there on Monday, December 20th. He demanded payment and he could not obtain it. On the 21st, the Federal Reserve Bank of Richmond notified the Citizens & Southern Bank that they could not obtain payment from the Bank of Lumber Bridge.

We respectfully submit that the Federal Reserve Bank of Richmond did all that a diligent man could do with his own interest at stake. Opposing counsel contend that when the Federal Reserve Bank of Richmond accepted the exchange draft the Bank of Lumber Bridge still had sufficient cash and available balances to have paid $9,000.00, but it is obvious that the Federal Reserve Bank of Richmond could not know that the draft which it held was not good until it was presented. When it was presented it could only go to the Bank of Lumber Bridge and demand payment of the sum represented by the dishonored draft. It did this and it could not get payment. After payment was thus refused, the Federal Reserve

Bank of Richmond could have done nothing except to have brought suit upon the dishonored draft, but this would only have resulted in the closing of the Bank of Lumber Bridge. The Bank of Lumber Bridge may have had other assets but the Federal Reserve Bank of Richmond could not reach these assets without suit. It is very obvious that no material change took place in the situation of any party after December 15th. Whatever rights then existed existed when this suit was brought, and, therefore, the liability of the Federal Reserve Bank of Richmond cannot have altered since that time. If it did not render itself liable by accepting the exchange draft, it cannot be liable now, for since then it has done nothing but make a diligent, but unsuccessful, effort to collect the exchange draft, and it could have done no more.

ANSWER TO PLAINTIFF'S DISCUSSION OF THE SECOND ASSIGNMENT OF ERROR.

As we stated in our original brief, the second assignment of error does not present a proposition separate from the first.

We did not attempt to prove that banks were usually *authorized* to send checks to the banks upon which they were drawn or that they were usually authorized to accept exchange drafts from the drawee, but we did attempt to prove, and we think we showed beyond doubt, and in fact it is generally known, that banks do follow this method in practice and that, consequently, the statutes and regulations and contracts to which we have referred must be read as applying to existing practices of banks. If these are so read, it clearly appears that authority to send a check directly to the drawee means authority to send it to the drawee for remittance in the usual way, which is by an exchange draft, transfer of money, or shipment of currency.

We desire, however, to again call attention to the fact that the Malloys' ignorance or knowledge of banking customs can have nothing to do with this case. It is clearly established by the decisions of this court and all courts that contracts are construed in the light of general and universal customs and that the ignorance of a party to a contract of the existence of a custom will in no way affect the case if it appears that the custom is general and universal, for he must be conclusively presumed to have knowledge of the ordinary ways and means by which business affairs are conducted. This rule of law has especial value in actions in which the right of action depends on negligence; for negligence is, by definition, failure to do that which is usually done by prudent men in similar situations. If a different rule were adopted, we would find that there would be one rule for the ignorant and another for the well informed. The law would set a premium upon ignorance. This principle has been clearly stated by this court in the case of *Fowler* v. *Brantly*, 14 Pet. 318, 10 L. Ed. 473 (Italics ours):

> "The known customs of the bank, and its ordinary modes of transacting business, including the prescribed forms of notes offered for discount, were matters of proof, and entered into the contract; and the parties to it must be understood as having governed themselves by such customs and modes of doing business; *and this, whether they had actual knowledge of them or not;* and it was especially the duty of all those dealing for the paper in question to ascertain them, if unknown. Such is the established doctrine of this court, as laid down in *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Mills* v. *Bank of the United States*, 11 Wheat. 431; and *Bank of Washington* v. *Triplett*, 1 Peters 32, 33."

We submit in conclusion in this case that there are but two propositions for the court to decide:

First. Can Malloy Brothers maintain this action? We have pointed out that under the weight of authority in the Federal courts they cannot, but if they can do so they can do so only upon the theory that each successive bank was their agent; that is to say, that the Citizens & Southern Bank was their agent, and they, therefore, stand in the shoes of the Citizens & Southern Bank in every respect.

The second question is to determine the nature of the obligation imposed upon the Federal Reserve Banks by their contract with the Citizens & Southern Bank. Regardless of whether we consider the transaction between them as governed by the regulation of the Federal Reserve Board, the circular of the Federal Reserve Bank of Atlanta, the statute of Georgia, or the statute of North Carolina, in every case the result is the same. The Federal Reserve Banks were agents only, authorized to send the check directly to the bank upon which it was drawn without being responsible for the default of this drawee bank, or, indeed, for anything except negligence. Authority to send the check to the bank on which it is drawn necessarily implies authority to accept a remittance draft, because this is the usual method of making settlement and because when a check is surrendered to the drawee and the drawee accepts it, the drawer is released, the drawee becomes a debtor to the holder, and the acceptance of the exchange draft from the drawee, who has become the principal debtor, is merely a usual and convenient means of securing payment from this drawee.

Respectfully submitted this 7th day of January, 1924.

M. G. WALLACE,
Counsel for plaintiff in error.

FEDERAL RESERVE BANK OF RICHMOND *v.* MALLOY ET AL., TRADING AS MALLOY BROTHERS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 553. Argued January 9, 1924.—Decided February 18, 1924.

1. Generally, as held in *Exchange Natl. Bank* v. *Third Natl. Bank*, 112 U. S. 276, where a check, deposited by the owner in a bank, is forwarded by it in due course to another bank for collection, the second bank does not become responsible, as an agent, to the owner. P. 164.
2. But it is otherwise where, by a state statute with reference to which the first bank and the check-owner presumably contract, the forwarding of such instruments for collection, in the regular course of banking, is to be deemed due diligence acquitting the forwarding bank of liability until it has received actual payment, for, in such case, the initial bank has implied authority to employ another bank as subagent, and this in turn another, and the risk of their default or neglect is with the depositor of the instrument. *Id.*
3. If a bank, responsible to the payee for the collection of a check, surrender the check to the drawee bank and accept in payment an exchange draft of that bank which proves worthless, the collecting bank is liable to the payee of the check for the resulting loss. P. 165.

4 A regulation of the Federal Reserve Board providing for authority to Federal Reserve Banks "to send checks for collection" to banks on which they were drawn, cannot be enlarged by implication to include authority to accept a draft of the drawee of a check in payment. P. 166.

5. A practice of banks to send checks for collection to the banks on which they are drawn, with the expectation that they will be cancelled and charged to the makers and remittance returned either in currency or by the drawees' exchange drafts, lacks the certainty and uniformity essential to make it a custom binding the owner of a check who did not know of it. P. 169.

6. Assuming that the legal principles forbidding that a check be entrusted for collection to the bank on which it is drawn, and requiring payment in money, can be supplanted by custom, the custom must be as definite and specific as the principles themselves. P. 171.

291 Fed. 763, affirmed.

ERROR to a judgment of the Circuit Court of Appeals, which affirmed a recovery in the District Court of the amount of a check.

Mr. M. G. Wallace for plaintiff in error.

Mr. Robert H. Dye for defendants in error

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Malloy Brothers brought this action against the Federal Reserve Bank of Richmond in a state court, to recover $9,000, alleged to be the amount of a check drawn to their order upon the Bank of Lumber Bridge, North Carolina. The case was removed to the Federal District Court for the Eastern District of North Carolina, where it was tried without a jury and judgment rendered for plaintiffs, 281 Fed. 997, which was affirmed by the Court of Appeals. 291 Fed. 763.

The check was drawn on November 30, 1920, delivered to and received by plaintiffs and the amount credited

to the drawer. It was properly indorsed and deposited with the Perry Banking Company of Perry, Florida, for collection and credit, on December 1. A credit card was delivered to plaintiffs upon which was printed: "Checks, drafts, etc., received for collection or deposit, are taken at the risk of the endorser until actual payment is received."

A statute of Florida, then and ever since in force (Laws of Florida, 1909, c. 5951, p. 146) provides as follows:

"That when a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward *en route* the same without delay in the usual commercial way in use according to the regular course of business of banks, and that the maker, endorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and that when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part, as aforesaid."

The Perry Banking Company indorsed and transmitted the check to a bank at Jacksonville, Florida, which, in turn, indorsed and transmitted it, on account of the Atlanta Federal Reserve Bank, to a bank at Atlanta, Georgia; and by the latter bank it was transmitted for collection to the Richmond bank, defendant herein.

On December 10, 1920, the Richmond bank transmitted the check, together with several other small checks, to the Lumber Bridge bank for collection and return. The letter containing these checks, by regular course of mail, should have been received, and, so far as appears, was received, by the Lumber Bridge bank on

Saturday, December 11th. On Tuesday, December 14th, the check in question was stamped "Paid" and charged to the account of the drawer, and on the same day the Lumber Bridge bank transmitted to the Richmond bank its draft on the Atlantic Banking & Trust Company, of Greensboro, North Carolina, for the aggregate amount of the checks, including the one here in question. The draft was received by the Richmond bank on December 15th, and immediately forwarded to the bank at Greensboro for payment. On December 17th the Greensboro bank notified the Richmond bank by wire that the Lumber Bridge bank did not have sufficient funds to its credit to pay the draft. Thereupon the Richmond bank wired the Lumber Bridge bank that its draft had been dishonored and called upon it to make it good. The Lumber Bridge bank answered, promising to do so. It failed, however, and the Richmond bank thereupon sent a representative to Lumber Bridge, who reached there on the morning of December 20th, and demanded payment of the draft from the cashier of the Lumber Bridge bank. The cashier of that bank, after stating that it did not have sufficient funds to pay the dishonored draft promised that steps would be taken to meet it.

On December 21st the representative of the Richmond bank was informed that the dishonored draft could not be paid and on the same day the Richmond bank notified the Atlanta bank of the situation and this notice was promptly transmitted to the plaintiffs. The amount of the check was thereupon charged by the Richmond bank to the Atlanta bank, which, in turn, charged the amount to its immediate correspondent and so on until it was finally charged back to the plaintiffs.

In view of the conclusion which we have reached, we find it necessary to consider but two questions:

1. Can the present action be maintained by plaintiffs, Malloy Brothers, against the Richmond bank? and

2. If so, did the failure of the Richmond bank to require payment of the Malloy check in money, and its acceptance of what turned out to be a worthless draft in lieu thereof, create a liability against it and in favor of Malloy Brothers for the amount of the loss?

First. The state decisions in respect of the liability of a correspondent bank to the owner of a check forwarded for collection by the initial bank of deposit are in conflict beyond the possibility of reconciliation. A number of States, following the "New York rule," so-called, have held that there is no such direct liability, but that the initial bank alone is responsible to the owner. On the other hand, an equal, if not a greater, number of States following the "Massachusetts rule," have held exactly the contrary, viz: that the initial bank by the mere fact of deposit for collection, is authorized to employ subagents, who thereupon become the agents of the owner and directly responsible to him for their defaults. This Court, in *Exchange National Bank* v. *Third National Bank,* 112 U. S. 276, after reviewing the two lines of decisions, approved the "New York rule." But the rule may, of course, be varied by contract, express or implied. *Id.* 289. Here the relations of the drawee to the initial bank of deposit are controlled by the Florida statute with respect to which it must be presumed they dealt with each other. This statute had the effect of importing the "Massachusetts rule" into the contract, with the result that the initial bank had implied authority to intrust the collection of the check to a subagent and that subagent, in turn, to another; and the risk of any default or neglect on their part, rested upon the owners. 112 U. S. 281. It follows that the action was properly brought against the Richmond bank.

Second. For the purposes of the case, we assume the correctness of the decision below, holding that the Richmond bank was not negligent in sending the check di-

rectly to the bank on which it was drawn, and consider only whether the acceptance of an exchange draft, found to be worthless, instead of money, creates an enforceable liability.

It is settled law that a collecting agent is without authority to accept for the debt of his principal anything but "that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par." *Ward* v. *Smith*, 7 Wall. 447, 452. The rule applies to a bank receiving commercial paper for collection, and if such bank accepts the check of the party bound to make payment and surrenders the paper, it is responsible to the owner for any resulting loss. *Fifth National Bank* v. *Ashwo h*, 123 Pa. St. 212, 218; *Hazlett* v. *Commercial National Bank*, 132 Pa. St. 118, 125; *Bank* v. *Bank*, 151 Mo. 320, 329; *Essex County National Bank* v. *Bank of Montreal*, 7 Biss. 193, 8 Fed. Cas. No. 4532; *Noble* v. *Doughten*, 72 Kans. 336, 351-353; *Anderson* v. *Gill*, 79 Md. 312, 317; *Bank of Antigo* v. *Union Trust Co.*, 149 Ill. 343, 351. It is unnecessary to cite other decisions since they are all practically uniform. *Anderson* v. *Gill, supra,* presented a situation practically the same as that we are here dealing with, and the Supreme Court of Maryland, in disposing of it, said:

"Now, a check on a bank or banker is payable in money, and in nothing else. Morse Banks & Banking (2d edition), p. 268. The drawer having funds to his credit with the drawee has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should upon presentation, instead of requiring the cash to be paid, accept at the drawer's risk a check of the drawee upon some other bank or

banker. The holder had a right to make immediate demand for payment upon receipt of Anderson's check, though she was not bound to do so. When her agent, the Old Town Bank—the collecting bank being the agent of the holder—(*Dodge* v. *Freedman's Sav. & Tru. Co.*, 93 U. S. 379) did make demand it was only authorized to receive *money* (*Ward* v. *Smith*, 7 Wall. 451); and the acceptance by the collecting agent of anything else rendered it as liable to the holder as though it had collected the cash."

Acceptance of the draft by the Richmond bank as payment of the Malloy check had the effect of releasing the drawer and therefore materially altering the relations of the parties. Technically, there resulted a transfer of the drawer's funds and his right of action against the drawee bank; and previous rights and obligations between the owners of the check and drawer were superseded. It follows,—this result having been brought about by the unauthorized act of the Richmond bank, standing in that transaction in the relation of agent to the owners of the check,—that such owners are entitled to recover from the Richmond bank for the loss which they sustained, unless the case falls within some exception to the general rule.

And as to this, the Richmond bank says: (1) That its immediate correspondent, from whom it received the check, was bound by a regulation of the Federal Reserve Board, which authorized the method of collection pursued, and that, since that correspondent was the agent of the owners of the check in the transaction, they are likewise bound; (2) that the method was justified by a custom, binding upon Malloy Brothers. We consider these contentions in their order.

1. The regulation relied on, so far as pertinent, is to the effect that a Federal Reserve bank will act as agent only in handling items for member and non-member banks, who are required to authorize " its Federal Reserve bank

to send checks for collection to banks on which checks were drawn, and, except for negligence, such Federal Reserve banks will assume no liability." Regulation J (8) of 1920. This regulation, while it contemplates the sending of checks for collection to the drawee banks, does not expressly permit the acceptance of payment other than in money. It is insisted, however, that the authority to send checks to the drawee bank carries with it, by necessary implication, authority to accept a draft in payment from the drawee. We assume, for the purposes of the argument, that the obligation which the law imposes to collect only in money may be varied by a regulation, clearly and positively so providing, although, in terms, it relates only to the banks *inter se*, upon the ground that the owner of the check is bound by the knowledge and consent of his subagent. But to justify an extension by implication of the terms of the regulation, it must be made to appear, at least, that the addition sought to be annexed is a necessary means to carry into effect the authority expressly given by the regulation. See *First National Bank* v. *Missouri*, 263 U. S. 640. It follows from this limitation upon the extent and purpose of implied powers, that a distinct and independent power cannot be brought into existence by implication from the grant of another distinct power. In other words, authority to do a specific thing carries with it by implication the power to do whatever is necessary to effectuate the thing authorized—not to do another and separate thing, since that would be, not to carry the authority granted into effect, but to add an authority beyond the terms of the grant. The authority expressed by the regulation is "to send checks for collection to banks on which checks were drawn;" the authority now sought to be annexed by implication is "to accept exchange drafts in payment," instead of money, as required by law. That neither is a necessary means of carrying the other into effect, is clear. Nor are

they necessary to each other in the sense that they are corollary or dependent. Certainly a check may be sent for collection to the drawee bank without entailing the necessity of remitting the amount in the form of exchange. Currency itself may be sent; and, as will appear presently, frequently is sent. The first form of remittance, to be sure, is more convenient; but it is not of such necessity as to exclude the second on the score of impracticability. There is nothing to prevent the sending bank from requiring the drawee to remit currency as a condition upon which the check may be satisfied and charged to the account of the drawer. We must not lose sight of the fact that we are here dealing with two distinct rules of law, both of which are sought to be avoided: (a) that which forbids a bank having paper for collection to use the drawee bank as a collecting agent; and (b) that which forbids a collecting agent accepting anything but money in payment. The first rule is probably based upon the theory that the drawee is not a suitable agent for the enforcement of his own obligation, and that commercial paper calling upon him to pay should not be surrendered to and satisfied by him, with the consequent release of the drawer, except upon previous or contemporaneous payment. The second rule proceeds upon the fact that the obligation of the drawee is to pay in money and nothing else. Plainly, the two rules are of such nature that one may be abrogated without the other; and it is obvious, since the law imposes upon a collecting agent the duty to collect in money, that none of the various subagents, receiving the paper to be collected upon the basis of that duty, can waive the requirement of the law in favor of the agent to whom it is transmitted. Indeed, in transmitting the check here in question to the Richmond bank the intermediate banks, in effect, served only as instruments for effectuating the transmission. In essence and in substance the check was delivered by its owners to the

Richmond bank; it is to that bank, as we have said, they must look for redress; and the responsibility of that bank is the same as though the check had been delivered directly to it for collection by the owners.

In this connection, certain state statutes are also referred to, but, if applicable, we find nothing in them that justifies a different conclusion from that reached in respect of the regulation just considered. Their provisions are in substance the same.

2. Finally, it is urged that the acceptance of the drawee's own draft, instead of money, was justified by custom. The testimony relied upon to establish the custom follows:

"The business of check collecting is handled by the Federal Reserve Bank in a way very similar to that in which it is handled by collecting banks throughout the country. When one bank receives checks on another in a distant city, it usually sends them to the bank upon which they are drawn or to some other bank in that city, and receives settlement by means of an exchange draft drawn by the bank to which the checks are sent upon some one of its correspondents. *When checks are sent with the expectation that the bank receiving them will remit at once, we call it sending for collection and return. When this is done, the bank upon which the checks are drawn is expected to cancel the checks and charge them to the accounts of the drawers and to remit by means of its exchange draft or by a shipment of currency.* An exchange draft is used more frequently than a shipment of currency."

It thus appears that the custom, if otherwise established, does not fix a definite and uniform method of remittance. When checks are sent for collection and return, the bank is expected to cancel the checks and charge them to the account of the drawers and remit "by means of its exchange draft *or by a shipment of currency,*" the